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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

The possible utility, scope and structure of a special study on the issue of privatization of prisons

Outline prepared by Mrs. Claire Palley pursuant to
Sub-Commission decision 1992/107

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Note: See also Human Rights - A Compilation of International Instruments, United Nations, New York, 1988, for:

(i) Standard Minimum Rules for the Treatment of Prisoners (pp. 190-209);

(ii) Code of Conduct for Law Enforcement Officials (pp. 226-232);

(iii) International Labour Organisation Convention No. 29 concerning Forced Labour (pp. 166-178).

Introduction

1. The issue of the privatization of prisons was brought to the attention of the Sub-Commission's Working Group on Detention for the first time during its 1988 session when it was raised by Mr. Alfonso Martinez. 1/ The enlightening debate which followed his opening remarks at the Working Group's 1989 session led the Working Group to recommend that Mr. Alfonso Martinez be requested to prepare a document "... containing proposals on the best way to approach the study on the privatization of prisons". 2/ Acting upon this recommendation, the Sub-Commission requested Mr. Alfonso Martinez to prepare a working paper containing "proposals on the best way for the Sub-Commission to study further the issue of privatization of prisons". 3/ Owing to his other major Sub-Commission commitments, Mr. Alfonso Martinez' paper could only be submitted for consideration at the 1991 session. Having examined his working paper, 4/ the Sub-Commission, without a vote, decided to request Governments and intergovernmental and non-governmental organizations to submit their views on this matter to the Secretary-General; to request the Secretary-General to submit to the Sub-Commission a working paper containing a systematic compilation of and analytical comments on those views; and to consider the question of the privatization of prisons at its forty-fourth session under item 10 (a) of its provisional agenda. 5/

2. At its forty-fourth session in 1992 the Sub-Commission took into account Mr. Alfonso Martinez' 1991 working paper and the Secretary-General's working paper reporting and analysing views on the issue of privatization of prisons, submitted following the Sub-Commission's request. 6/ Recalling its decisions 1989/110 of 1 September 1989 and 1991/105 of 28 August 1991, and taking into account the above-mentioned working papers and the report of the Working Group on Detention at its forty-fourth session, 7/ the Sub-Commission decided (decision 1992/107 of 27 August 1992) without a vote:

(a) To request Mrs. Claire Palley to prepare "an outline of the possible utility, scope and structure of a special study which may be undertaken on the issue of privatization of prisons";

(b) To submit this outline to the Working Group and to the Sub-Commission at its forty-fifth session; and

(c) To request the Secretary-General to provide Mrs. Palley with all possible assistance for the completion of her task.

3. Pursuant to this decision, further requests for information were made by the Centre of Human Rights to those Governments known recently to have developed privatized aspects of running prisons. Of such Governments, those of Australia and France sent replies, while the Government of the United Kingdom of Great Britain and Northern Ireland directly provided Mrs. Palley with information on contracted-out prisons and prisoner escort arrangements. Replies to the Secretary-General's earlier requests were also given by the Governments of the Republic of Sudan and Spain.

4. The Spanish General Prisons Organization Act (No. 1/79) specifies the functions of the penal institution and limits the execution of custodial sentences to penal institutions. This limitation has not prevented the

contracting of the services of private firms in a few specific cases in the area of catering and in the area of security for the control of electronic systems (sensors, closed television circuits) installed on the outside of penal institutions. The Government of Spain had no plans substantially to amend existing legislation to provide for the privatization of prisons.

5. The Government of Sudan considered that prisons should not be transferred to the private sector on grounds of the principle that only a State executive body with judicial characteristics and free from extraneous influence should enforce court judgements. Concern was expressed about the effect of profit margins conflicting with the interests of inmates and rehabilitatory measures. The Government of Sudan also pointed to the need for prison employees to act in a context of systematic work based on discipline similar to that expected from a regular paramilitary force, but with there being complications with unionization of labour. There were also risks of organized gangs, particularly of drug traffickers, abusing such arrangements. The private sector could, however, play a role by using inmates' labour, provided that administrative supervision of penal institutions and enforcement of court judgements were in the hands of an executive body (the Prison Service) directly supervised by the judiciary and the legislative authority.

6. The present outline has been prepared for submission to the Working Group on Detention and the Sub-Commission at its forty-fifth session pursuant to decision 1992/107. Its purpose is to raise the main questions requiring consideration in any future study and thus to provide a basis for discussion on whether a study is necessary.

I. RELEVANT EXISTING INTERNATIONAL NORMS

A. International human rights norms (global human rights instruments) concerning prison administration personnel

7. The major universal and regional instruments do not, when defining human rights or when dealing with deprivation of liberty, punishment and permissible restrictions on human rights, mention the mode of prison administration or the status of prison staff. However, several subsidiary instruments are relevant. Rule 46 (3) of the Standard Minimum Rules for the Treatment of Prisoners 8/ expressly provides that prison administration personnel shall be professional prison officers and have civil service status with security of tenure.

8. A useful description of the legal impact of the Standard Minimum Rules was given in the American case of Lareau v. Manson, 9/ which explained their effect in international law and their relevance to municipal systems which contain "Due Process" clauses or prohibitions against cruel and unusual punishment. The analysis is equally applicable to other subsidiary instruments mentioned below, such as the Code of Conduct for Law Enforcement Officials. Judge Cabranes held:

> "Those standards may be significant as expressions of the obligations to the international community of the Member States of the United Nations, cf. Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980), and as part of the body of international law (including customary international law) concerning human rights which has been built upon the foundation of

the United Nations Charter ... Article 55 of the Charter provides that the United Nations shall promote the observance of human rights; in Article 56 the Member States pledge 'to take joint and separate action in cooperation with the Organization for the achievement' of the goals of Article 55; and Article 62 (2) of the Charter authorizes the Economic and Social Council of the United Nations to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.

"In adopting the Standard Minimum Rules for the Treatment of Prisoners, the Economic and Social Council acted in furtherance of this mandate to set international standards promoting the observance of human rights ...

"The adoption of the Standard Minimum Rules by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders and its subsequent approval by the Economic and Social Council does not necessarily render them applicable here. However, these actions constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant to the 'canons of decency and fairness which express the notions of justice' embodied in the Due Process Clause ... In this regard, it is significant that federal courts - including the Supreme Court and the Court of Appeals for the Second Circuit - have invoked the Standard Minimum Rules for guidance in particular cases. See, e.g., Estelle v. Gamble, 429 U.S. at 103-104 & n.8 ... (citing the Standard Minimum Rules as evidence of 'contemporary standards of decency' for purposes of the Eighth Amendment)."

9. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (see annex I) in Principle 2 provides that

"Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."

For purposes of the Body of Principles it is provided that:

"(b) 'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence;

"(c) 'Imprisoned person' means any person deprived of personal liberty as a result of conviction for an offence."

In the Body of Principles there are numerous references to "authorities" in relation to detained or imprisoned persons (Principles 29-33). Other of the Principles (12.1.(c), 18.4, 23.1 and 35) refer to "law enforcement officials" and to damages incurred because of "a public official". From the structure of the Body of Principles as a whole it is implicit that "authorities" in

relation to administration of the place of detention refers to officials of the State. 10/ (For convenience, the Body of Principles is annexed to this outline.)

10. The Code of Conduct for Law Enforcement Officials 11/ in article I, Commentary, defines "law enforcement officials" as including "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention". The preamble emphasizes

> "(a) That, like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole, ...
>
> "(c) That every law enforcement official is part of the criminal justice system, the aim of which is to prevent and control crime, and that the conduct of every functionary within the system has an impact on the entire system."

It is implicit in the Code of Conduct that persons exercising police powers and responsible for detention are "law enforcement officials" and that private citizens acting in terms of contract were not contemplated as forming part of the criminal justice system.

B. Regional human rights norms concerning prison administration personnel

11. The Council of Europe's Standard Minimum Rules for the Treatment of Prisoners (as amended in 1987), which set out minimum standards for prison administration, provide in rule 54 that

> "54. (1) The prison administration shall provide for the careful selection on recruitment or in subsequent appointments of all personnel. Special emphasis shall be given to their integrity, humanity, professional capacity and personal suitability for the work.
>
> (2) Personnel shall normally be appointed on a permanent basis as professional prison staff and have civil service status with security of tenure subject only to good conduct, efficiency, good physical and mental health and an adequate standard of education. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.
>
> (3) Whenever it is necessary to employ part-time staff, these criteria should apply to them as far as that is appropriate."

The provision that all personnel should "normally" have civil service status makes it clear that non-civil servants are only exceptionally to be members of the prison staff. That exception would allow continuance of long-standing practices, such as appointing certain professional persons, like doctors and chaplains, to perform limited services for the prison. The exception, as

worded, is not apt to cover contracting out of the whole prison administration of particular prisons. (The preamble and relevant rules regarding personnel are annexed to this outline.)

12. The human rights provisions of documents of the Conference on Security and Cooperation in Europe (CSCE) are not legally binding instruments, but constitute political commitments which the Participating States have repeatedly agreed to implement. The commitments have been further built on by the CSCE Helsinki Declaration of 20 July 1992, which established a structured intergovernmental mechanism and institutions to oversee the Participating States' commitments. Enforcement consists merely of political persuasion because the principle of consensus applies to this "Pan-European and North American" order established by the Final Act of Helsinki and follow-up meetings of the Conference. None the less, the CSCE Participating States have, by their Documents, undertaken commitments broadly equivalent to the two United Nations International Covenants, the European Convention on Human Rights and Fundamental Freedoms and other international norms.

13. Relevant to prison privatization is paragraph 23 of the Vienna Concluding Document of 15 January 1989. This provides:

"The participating States will ...

(23.2) - ensure that all individuals in detention or incarceration will be treated with humanity and with respect for the inherent dignity of the human person;

(23.3) - observe the United Nations Standard Minimum Rules for the Treatment of Prisoners as well as the United Nations Code of Conduct for Law Enforcement Officials;

(23.4) - prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices;

(23.5) - consider acceding to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, if they have not yet done so."

14. The Participating States reaffirmed "their commitment to implement fully all provisions ... of the other CSCE documents relating to the human dimension" in the preamble to the Document of the 29 June 1990 Copenhagen Meeting. In addition, in paragraph I.16.4. of the Document, Participating States agreed to

"ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment".

When examined in its context, the reference to "other persons who may be involved" in addition to law enforcement personnel and public officials, does not cut across the commitment undertaken at the January 1989 Vienna Follow-Up Meeting to observe the two sets of United Nations standards. The paragraph's general wording was obviously designed to cover unmentioned cases, for example cleaners, caterers, staff of children's homes, or any persons who might become "involved" in the treatment of prisoners, rather than specifying who was to receive such education by way of a lengthy catalogue, which might prove incomplete.

C. Norms relating to forced labour

15. ILO Convention (No. 29) Concerning Forced Labour 12/ provides in article 2.1 that

> "forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

Article 2.2 (c) of the Convention excludes from this definition

> "Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations."

Article 4 of the Convention prohibits forced or compulsory labour for the benefit of private individuals, companies or associations. Under article 5 no concession to private individuals, companies or associations shall involve any form of such labour for the production or collection of goods which the said private individuals or bodies utilize or trade. Finally, under article 6, officials of the State, even when they have the duty of encouraging the population under their charge to engage in some form of labour, shall not put constraints upon persons to work for private individuals or bodies.

16. It needs noting that in those States which have ratified ILO Convention No. 105, prohibiting forced or compulsory labour as a punishment for holding or expressing political views ideologically opposed to the established political social or economic system (which possibly includes offences committed for political motives), such labour for private persons would a fortiori be precluded.

17. The provisions of ILO Convention No. 29 go much further than the International Covenant on Civil and Political Rights. Article 8.3 (b) of the Covenant safeguards continuing imposition of hard labour in countries where this is a permissible punishment for a crime in pursuance of a sentence by a competent court. Article 8.3 (c) (i) similarly excludes from the prohibition on forced or compulsory labour any work or service normally required of a person under detention in consequence of a lawful order of a court or of a person under conditional release from such detention.

18. Article 4.3 (a) of the European Convention on Human Rights and Fundamental Freedoms was the model for article 8.3 (c) (i) of the Covenant. That article of the European Convention has been interpreted by the European Commission on Human Rights as not preventing the State from concluding contracts with private firms for work required of prisoners during their detention and as not indicating that a prisoner's obligation to work must be limited to work within the prison or for the State. 13/ In contrast, article 6 (3) (a) of the 1969 American Convention on Human Rights adopts the wording of article 2.2 (c) of ILO Convention No. 29.

19. In the case of States party to ILO Convention No. 29, or to the American Convention on Human Rights, which have incorporated either of these into their municipal law, the higher standard prohibiting forced or compulsory labour for or under private persons will prevail, particularly in the light of article 5.2 of the International Covenant, which prohibits restrictions or derogations from any fundamental human rights recognized or existing in any State pursuant to law or conventions on the pretext that the Covenant recognizes them to a lesser extent.

II. THE CONCEPT OF PRIVATIZATION OF PRISONS, ITS SCOPE, BACKGROUND AND GROWING APPLICATION WORLDWIDE

20. "Privatization" means private sector involvement in government functions or provision of services. Before defining "prison privatization" it is essential, in order to have a proper perspective, to understand the phenomenon of privatization of the penal system, which means private sector involvement in implementation of penal policy and functions. The "carceral continuum" of the penal system, pointed to by Foucault, now stretches deeply into the prison, and, because of the developing ideologies of community crime control and privatization, extends widely through the community. 14/ At the "soft end" of this continuum the private sector is widely involved in implementation of penal policy. Indeed, it was such private sector involvement, perceived as successful, which was an important factor in encouraging privatization at the "hard end" that is to say in adult detention or imprisonment facilities in Canada and in the United States of America, early leaders in recent arrangements for prison privatization. 15/ In this context it is important to note that private sector involvement is not necessarily for "profit". Voluntary and non-governmental organizations in many States have initiated or participated in juvenile offender institutions and programmes, non-secure institutions such as half-way houses, probation and parole services and rehabilitative education and facilities. 16/

21. In order to provide an overall picture, it needs to be pointed out that there has been, or is, private sector involvement in a wide range of penal functions, facilities and services. The involvement in relation to detained or imprisoned persons and to persons facing trial or undergoing punishment covers:

(a) Financing the cost or rehabilitation of prisons and detention facilities;

(b) Prison construction, whether with public finances, in which case ownership will be vested in the State, or with private finance, when the prison will either remain in private ownership, subject to leasing or other contractual arrangements or be sold to the State;

(c) Provision of professional services, facilities and goods to prisons and places of detention, for example medical and psychiatric services, educational and vocational training for inmates and staff, chaplaincy services, catering, building maintenance, supply of goods, security hardware and computerized information systems;

(d) Control of or participation in prison work programmes and industries or contractual arrangements for the labour of prisoners;

(e) Management and operation of the entire prison or place of detention, including juvenile reform schools, community treatment centres and illegal immigrant centres;

(f) Management of pre-trial and post-prison non-secure institutions, for example bail hostels and half-way houses;

(g) Punishments alternative to prison, for example surveillance and community service;

(h) Combinations of and variations on these arrangements. 17/

22. Each type of participation by the private sector raises legal, policy and practical issues. The most controversial of these involvements have been handing over by the State to private bodies of the control and management of an entire institution and the hiring out of prison labour. These are not new phenomena. They involve, but currently without the abuses, a reversion to eighteenth and nineteenth century and even earlier practices of prison management and of exploitation of prisoner labour which went on from the sixteenth century in Europe and as late as the mid-twentieth century in some southern states of the United States. 18/ Proponents of these activities assert that the recent specialized contractual arrangements, reviving private sector prison operation and involvement in prison industries, have been beneficial to prisoners. Impartial analysts have not criticized involvement in prison industries, instead insisting on appropriate safeguards, but opinion has been divided on the transfer of management and control of prisons to private bodies, even when this transfer of management has been subject to State monitoring and an ultimate executive power to intervene. The thrust of the opposition is that, whereas it may suffice for standards to be set, accompanied by adequate scrutiny, for lesser degrees of involvement with persons subject to the State's coercive police power of detention and imprisonment, the degree of transfer of State responsibility may be so great, when management of prisons is contracted out, as to amount to an unlawful abdication of State duties. It is contended that the implications of contracting with private bodies to administer punishment by restricting adult individuals' liberty 19/ make it an issue not merely of penal policy, but one raising legal questions as to the role of Governments and their duties to the individual in much of the sphere of human rights. That line of argument will be spelled out in paragraphs 64 to 75 below.

23. There have been many definitions of "privatization of prisons". Some have covered all the phenomena listed in paragraph 21 above. An Australian expert considers that "privatization" of prisons is something of a misnomer.

> "The concept refers not to private ownership and control of an enterprise, but to contract-management, that is private sector (or non-government) management of institutions which remain a public sector responsibility". 20/

The logic of this criticism was taken further by the Queensland Correctional Services Commission. Its Deputy Director-General explained:

> "Firstly, 'privatization' is not an appropriate term to use with respect to the involvement of the private sector in corrections in Queensland. This is because the State remains the owner of the physical infrastructure (at least in the case of correctional centres), the prisoners remain 'State' prisoners and can and do transfer between private sector and State operated institutions during their sentence and the State continues to fund the operation of the facilities. In fact the difference between the State and privately operated facilities is that the latter are managed on behalf of the QCSC by a private sector organization under contract which employs its own staff. Clearly, contract management is a more appropriate term to use in this context." 21/

The same attitude is taken by the Government of the United Kingdom:

> "We are not privatizing the management of prisons. Contracting out of prison is often wrongly known as privatization. This is not what is happening. It would be unacceptable if it was. The ultimate responsibility for all prisons, whether publicly or privately managed, lies with the Home Secretary." 22/

To confine the concept "privatization of prisons" to cases of private ownership of the enterprise of a prison and those where no governmental responsibility remains would, however, mean that major private sector involvement, potentially affecting the application of human rights, would not be considered as appropriate for study.

24. In a memorandum of 17 December 1992 the Government of France explained that the expression "privatization of prisons" was an inadequate description of the French situation. The programme which began in 1988 was in effect not a surrender of authority by the service public, but could be analysed as associated contracts with the public penitentiary service, corresponding to an experimental form of modernizing penal administration. The French pattern differs radically from that in the United Kingdom and in Australia, as the French penal administration reserves to itself "l'exercise de l'intégralité des fonctions régaliennes", retaining "les fonctions de direction, du greffe et de surveillance". In order to exercise such functions in penal establishments, there are more public functionaries than there are private sector employees, who deal with establishments' material (physical) functioning, such as maintenance of equipment, transportation, accommodation, catering, health, work and professional training and logistical support. None

the less, for purposes of comprehensively studying private sector involvement, it is necessary to include within the concept of "privatization of prisons" such provision of material functions, especially as prisoner transportation and labour are comprehended. In any event, the provision of services, facilities and goods should not be outside a definition if private sector activity impacting on human rights is to be examined. Such services sometimes occasion human rights violations. For example, food supplied in catering may be such as to deny the right to manifest religion in practice; security mechanisms may be so intrusive as to invade privacy; and educational training, in extreme circumstances, could invade the right to freedom of thought. It is particularly necessary to cover private sector prisoner escort services, because security guards are sometimes alleged to have subjected prisoners to degrading treatment or to have invaded their residual liberty.

25. Finally, the concept ought not to be confined to private sector involvement inside prisons. This would exclude from consideration private sector administration of non-custodial punishments, an area in respect of which there will be many new developments impacting on human rights, notably interference with privacy by way of surveillance. Such alternative forms of punishment have, however, the advantage of reducing deprivations of liberty by way of holding persons in custody. Arguably, private sector involvement in providing services by way of selling and monitoring surveillance or tagging devices allows the profit motive an alternative outlet, so that private sector pressure for keeping prisons full of inmates will be less likely. 23/

26. Overall, there must be concern whether private sector involvement at any stage in the administration of punishment, particularly in view of the limited applicability of the doctrine of Drittwirkung, has an adverse impact on human rights. For all these reasons, it is suggested that the concept of "privatization of prisons" should for purposes of any study be broadly defined as:

> "Private sector involvement in the treatment, custody or punishment of persons detained or imprisoned and involvement in the administration of any form of treatment or punishment, other than imprisonment, pursuant to the order or sentence of a court or tribunal established by law."

This proposed definition would leave the financing and construction of prisons outside the scope of the study. Of course, private sector involvement in these areas has major consequences. First, it encourages creation of a financial lobby with an interest in creating demand for its product, that is more prisons, thereby risking influencing penal policy to the detriment of alternative forms of punishment. Second, use of such financial methods often - as in some states in the United States of America - avoids normal democratic and legislative controls over public expenditure. None the less, because such phenomena are equally found in all aspects of provision of public services and goods and in political processes, and are not specific to the human rights of persons detained or imprisoned, they have not been included in the definition delimiting the proposed study.

27. It is important to bear in mind that analysis should not be diverted either by emotive slogans or by marketing language. Opponents say: "Prisons are not for profit" and point to the Orwellian names of corporations such as

"Group 4 Total Security Ltd" or "Detention Corporation". Supporters decline to talk of "privatization of prisons", let alone "privately managed incarceration", rather speaking of "facility management contracts", "contracting out", "provision of services", "confinement service contracts" and "prison industries". But such descriptions, even the euphemism of "rehabilitative residences or guesthouses" must not inhibit thought about the underlying issues. 24/

28. As already indicated, private involvement in running prisons and employing prison labour had a long history in Europe and America before its modern re-emergence. 25/ It is therefore important to emphasize that development of international human rights law and standards was very recent and that even if certain institutional arrangements were traditional State practices in earlier periods, this is in no way conclusive as to the modern international law of human rights. That body of international conventional and customary law and general principles, as now developed, must be determinative of the legality of questioned State practices. 26/

29. The revival of private involvement in prison operation and prison industries in the United States of America came half a century after such practices had virtually ended. Their disuse had been occasioned by public awareness of abuses and demands for better standards, adoption of rehabilitation as a major goal of punishment and in the case of prison industries more because of objections by labour unions to competition from exploited prison workers. Several factors, involving economic arguments and ideological beliefs contributed to the reinvolvement of private corporations in prison activities. Much was made of prudential considerations, with assertions as to the operational advantages of private sector involvement. Proof of the validity of the financial contentions is not yet available because of the relatively short time privatized facilities have been operating, the difficulty in making comparisons between better designed new and old prisons, the mix of prisoners held (high security prisoners cost more to hold), the mix of prison regimes for prisoners and hidden costs by way of State subsidy and overhead administration. Those supporting the concept argue that private involvement has been efficient, economic and effective. Those opposed dispute this.

30. If the arguments in favour are ultimately supported by incontrovertible evidence of success, the spread of prison privatization is likely, on economic and operational grounds alone, to be rapid. Already in the United States there has been development from private sector running of juvenile institutions, to immigrant detention centres, to local medium-security prisons, to high security adult prisons in the course of the 1980s. Yet the extent of private management must not be exaggerated. By the end of 1991, there were about 60 privately managed secure adult correctional facilities in 12 of 50 states, housing about 20,000 local, state and federal prisoners. This is a small percentage both of institutions and of the prison population: in 1990 there were 771,243 inmates of United States prisons. 27/ These figures include those prisoners for whom the Federal Government, through the Immigration and Naturalization Service, has contracts for facilities (primarily for detention of aliens and immigration offenders, as well as some juveniles). Although the 1988 President's Commission on Privatization recommended more privatization of prisons, the tendency has been concentration

on construction, finance and supply of goods and services. There is also a long-standing practice of the Federal Government and of many states to contract with local or other state penal facilities to hold prisoners on a per diem basis. Publicly run prisons thus act as vendors, providing institutional services to other units of government for a contractual fee. 28/

31. In Australia the first private prison became operational in January 1990 in Queensland. In less than three years the Queensland Correctional Services Commission:

> "moved from a situation where all correctional facilities were managed and operated by Commission staff to one where two of its 11 correctional centres and five of its seven community corrections centres are managed under contract by the private sector/community groups". 29/

The Australian State of New South Wales was due to open a 600-bed prison in March 1993 on a build-own-and-operate basis. 30/ In July 1992 the Government of New Zealand was putting out to tender two build-and-operate contracts for prisons, while the Government of Papua New Guinea had taken steps to contract out building and staffing, but not operation. 31/

32. The United Kingdom has rapidly expanded its policy of privatization of prisons. In July 1990 the Secretary of State for Home Affairs announced plans to contract out one remand prison on an experimental basis and to contract out prison escort work. In August 1991 section 84 of the Criminal Justice Act authorized the contracting out of new remand prisons. The Wolds Remand Prison opened on 6 April 1992 with a contract with Group 4 Remand Services Ltd. Three months later, in July 1992, powers were used to amend the Act to allow the contracting out of all new prisons, whether for remanded or convicted prisoners. Then in February 1993 the Act was further amended to permit all prisons, old and new alike, to have their management contracted out by the Secretary of State. A contract for the new prison of Blakenhurst, opened in April 1993 for both remanded and sentenced prisoners, was awarded to U.K. Detention Services Plc. 32/ In June 1993 it was announced that the running of juvenile facilities would be contracted out and the private sector was invited to tender. It needs noting that section 80 of the Act had from the outset permitted the making of arrangements for the delivery and custody of prisoners for purposes of attending courts or for transporting them to and between police stations and prisons and such arrangements were made with Group 4 Remand Services Ltd. for escort services in the first of 10 districts (ultimately intended to cover all of England and Wales). These privatized escort services came into operation on 5 April 1993. Earlier, in 1989, the Immigration Service Detention Centre at Harmondsworth (holding aliens awaiting determination of their cases), which had since 1970 been run by private contractors, was also the subject of a successful tender by Group 4 Remand Services Ltd. 33/

33. Expansion of prison privatization in Canada had by 1986 been extensive, particularly in the area of juvenile detention, half-way houses and the administration of non-custodial sanctions. 34/ Thereafter several provinces introduced electronic monitoring involving private sector

participation, while the Province of Alberta had by 1991 brought privately managed remand centres into operation. At that time there were no private prisons for convicted offenders.

34. In France the programme of modernization or privatization of prisons resulted between 1988 and 1992 in 21 out of 25 new establishments, creating 13,000 new places of detention, being contracted to the private sector. As explained in paragraph 24 above, the private contractor was responsible for their material functioning, while "fonctions de direction, du greffe et de surveillance" were retained by the service public pénitentiare.

35. There are major differences among States between the degree of involvement of the private sector in prison management:

(a) In some States in the United States prisons in their entirety are managed by the private sector, including custodial, surveillance, disciplinary and maintenance of order functions, as well as power to draw up prison conduct rules. As of 1987 no existing state statute envisioned any continuous or even regular State presence in privatized prisons, with the most frequent inspection being biannual.

(b) In France the above functions are exclusively those of the service public. 35/

(c) In England and Wales (thus far there have been no moves to privatize prisons in Scotland or Northern Ireland) the custodial, surveillance and maintenance of order functions can be contracted out, subject to the Secretary of State's power under section 88 of the 1991 Act to resume control of a contracted-out prison by appointing a Crown servant as governor for a limited period so as to secure effective control of a prison or where such an appointment is necessary in the interests of preserving the safety of any person or of preventing serious damage to property. Disciplinary powers are retained by a Crown servant, the controller, who is full-time at the prison. However, the contractor's staff are involved in discipline to the extent that they lay charges and give evidence. Their evidence would also be relevant in relation to whether conditions should be imposed when parole is granted to long-term prisoners. Exceptionally, in cases of urgency, prisoners may, by section 85 (3), be removed from association with other prisoners, temporarily confined in special cells or have special controls or restraint applied. The State's control and monitoring on the ground is preserved by the institution of the controller, involving the presence of one or two civil servants at the prison - in contrast to France where public servants outnumber contractors' employees. Certainly, with a public servant being involved full-time in monitoring, there is more supervision than there is under the current State system, with prisons headed by a Governor administering and responsible to an Area Manager in the Home Office. There are also inspections by the Chief Inspector of Prisons - currently each prison is inspected about once every two years. A summing up of the position would be that the day-to-day administration of punishment is devolved to the contractor, but award and allocation of punishment remains a State responsibility with an attenuated public service physical presence in the prison by way of the controller.

(d) In Queensland, Australia, the degree of state control is still less. Initially, privatized prisons required the full-time presence of a Monitor, but moved to twice weekly visits by an Auditor once operations no longer needed constant supervision.

(e) In all states there is provision for periodic or ad hoc audits and evaluation of whether the high standards specified in the contracts have been complied with. Contracts are subject to periodic revision and may not be renewed. Exceptionally they can be cancelled, but cancellation always involves legal disputes, practical difficulties about replacement arrangements and must be a decision of last resort.

36. A striking aspect of the delegation of management to the private sector is that this has not occurred in States with a developed law of public administration, backed up a body of droit administratif and with supervision of administrative bodies by special administrative tribunals. In States with the latter features the concept of Public Law and definite views on the prerogatives and dominion of the State are so strong that there are juridical difficulties (as in France) in seeking to transfer management of essential State functions to the private sector. In contrast, private sector prison management has not been perceived as conceptually difficult by Common Law States. 36/

37. The spread of private sector involvement in prisons and punishment has been encouraged by business recognition that corrections is a large market. In the United States alone the total capital and operational expenditures for the year 1990 were estimated for county, state and federal correctional systems as being more than $25 billion. 37/ The links of expertise and finance between consortia operating in this sphere in North America, Australia, the United Kingdom and in Europe show corporate awareness of the prospects worldwide. Such corporations are closely linked to the security industry and thence to military industries, resulting in an international corrections-commercial complex. For these reasons, some sociologists have expressed concern and voiced a need to study the influence of such firms on the criminal justice system, the impact of the profit motive on corrections policy and corrections populations, and the diversification of corporate activity into new spheres of criminal justice, particularly provision of surveillance technology. 38/

III. THE UTILITY OF A SPECIAL STUDY

38. It will be obvious that prison privatization is a proliferating phenomenon and that it is essential to understand why this is occurring so that informed decisions can be made whether to adopt or reject it in whole or in part. For this reason, the contentions of its supporters and opponents will be explained.

39. The core reason for such a study is that punishment, in particular imprisonment, means that the whole of the concerned individual's life-conduct is regulated in ways which, were they not authorized, would violate nearly every aspect of human rights. 39/ There must be additional concerns about legality and policy when supervision of detained or imprisoned human beings is carried out, not by agents of government, but by employees of private

businesses who have contracted to undertake regulation of prisoners' daily lives. The roles of such employers and their motives are not identical with those of the State: they may in part be acting altruistically and, like State servants, for recompense, but they are also acting on a commercially profitable basis, else they will rapidly cease to offer their services.

40. Wider theoretical issues of major significance are also involved. Questions need investigation as to the sources of State power to act coercively (and indeed to impose limitations on human rights) and whether there are any restrictions on how States may act in relation to powers with which they have been endowed by the people. The further question arises whether States are responsible in international law for exceeding those restrictions, if any.

41. If "prison privatization" is permissible, whether in part or to the fullest possible extent, it is necessary to examine whether additional safeguards by way of guidelines and standards need to be devised to govern privatized prison operations.

42. Finally, the point must be made that if the State can lawfully privatize prisons, subject to appropriate safeguards, this establishes a significant principle, which will be a precedent and justification for privatization in similar spheres where the State has the duty of maintaining order, administering justice and applying the law and in relation to which it may limit individual human rights. Such possible future spheres are the duties of the police, which would be justified as an extension of the principle of special forces of constabulary for nationalized industries or major utilities (railway, airport and harbour police, etc.). Development of the notion of the police as providing a "service" to "customers" (the public) has already been discussed by Government Ministers in some States in parallel with prison privatization; and examination of competitive performances between existing local forces is already being required. 40/ If there is no limit on State powers of delegation, security companies could tender to operate police forces. Similar arguments apply to extending rights of prosecution of criminal offences. The ultimate safeguard to protect the rights of individuals against criminal third parties when the State fails to do this is the right to bring a private prosecution, which the State can, however, stop by a public nolle prosequi. That precedent could be invoked as justification for extension, something already occurring with corporations prosecuting for copyright and other crimes, debts, etc. 41/ If private prosecutions are to become more frequent, there ought then to be rules separating the functions of investigation, accusation and aspects of adjudication. In relation to privatizing the conduct of civil proceedings there should be no objection to Alternative Debt Resolution, because this is voluntary, can be seen as an extension of arbitration and does not establish the law and norms for the whole of society, because decisions are not precedents. If, however, jurisdiction of private courts were to be compulsory, with individuals being subject to them, a policy which has been advocated, 42/ this civil justice privatization would be analogous to prison privatization. Once there are no limits on the nature of the functions which can be privatized, it is not inconceivable that national security may in part be privatized, first in technological areas of communications (which will infringe privacy rights) and later in respect of major public order disturbances to be put at an end by a

trained force of private security guards. However, it is probably unimaginable that Governments would want to contract functions to armed bodies of mercenary soldiers, although this practice has been adopted in some revolutionary situations. A final likely future development is that information which was once jealously guarded as solely to be seen by the State acting through its servants - and then only by public tax inspectors and not by other interested State departmental officials - will, if there is privatization of inland revenue functions, notably computerization of tax files, be handed for processing to private businesses with a likelihood of invasion of privacy and disclosure of correspondence. The same risk applies in case of social security or child-care records being handled by computer corporations.

A. Examination of the arguments supporting prison privatization and counter-arguments

43. The following arguments, many of which overlap, are underlain by moral principles commonly subscribed to by both supporters and opponents of prison privatization, who differ in their application of the principles and practical assessments reached. One ideological difference is sometimes present, namely, belief in desirability in principle of reducing the scope and size of government. When examining these arguments it should be remembered that the purpose of listing them is to understand why prison privatization is spreading and to be alerted to any factors likely adversely to affect the human rights of prisoners. The purpose is not to evaluate the most effective way of running prisons, or to decide which mode results in higher standards of general welfare for inmates. That is a prudential question, not overriding the primacy of human rights.

44. The supporting arguments and counter-contentions are:

(a) The participation of the private sector is necessary to effect reform. State prisons had become "humanitarian nightmares", 43/ with overcrowding, lack of sanitation, ventilation and heating, unbearable noise, inmate violence, absence of rehabilitation programmes, abuses by guards, harsh disciplinary measures, limited association with other prisoners and overly long periods of prisoners being locked in cells. Prison riots occurred regularly. In the United States court orders speedily to reduce overcrowding, combined with public unwillingness to pay more taxes to finance improved prisons, spurred reformers to legislative reform, attempted control by the courts and finally to the alternative of private sector involvement. Broadly similar motives impelled reform through privatization in France, Australia and the United Kingdom.

(b) Private sector involvement will remove obstacles to reform arising from trade union power. Reform attempts were hindered by some prison professionals, who resisted change. 44/ More prisoner hours out of cells meant more officers on duty. There was a sub-culture of tacit belief that prison arrangements were for prison officers' convenience and restrictive practices were rampant. Many officers were unrelievedly cynical about the rehabilitation of prisoners. In consequence, Governments became concerned about the extent of prison officers' trade union power over prison operating conditions. This feature was common to the United States, Australia and the

United Kingdom. 45/ Governments saw privatization as a way of rapidly implementing reform, creating better conditions not only by way of new and rehabilitated prisons, but by introducing flexibility and ending bureaucratic delay and obstruction due to rigid attitudes. Those opposing such privatization perceived the moves as a form of "union bashing", of exploiting labour by operating in states in the United States where union power was weak, of adversely affecting public employees' (prison officers') conditions of service by substituting alternative labour at lower wages, with longer working hours and reduced pension and social benefits. 46/

(c) Improved standards for the operation of prisons would best be introduced by drawing up detailed management contracts, compelling Governments (and their correctional authorities) to confront and clarify what they hope to achieve. Such management methods have been a catalyst, forcing Governments to examine what "output" they were seeking, rather than merely responding passively to the problems of dealing with prisoners despatched to them by courts and police or to some prison catastrophe. The specifications for privatized prisons far exceed any requirements earlier applicable in United Kingdom and Australian prisons. 47/ In the United Kingdom the preparation of such specifications stimulated the development of even more detailed standards to be applied by April 1994 to all public sector prisons. Opponents' response to this argument about benefits is that it merely shows that it is Governments which set and should set the standards, not the market, and that Governments can do this without complicating matters by a risky involvement of the private sector, which then necessitates monitoring of performance and of the proper observance of prisoners' rights. Opponents' comment about tackling trade union obstructionism would be on similar lines, namely, that it is the Government's duty of and defaults in addressing the deficiencies of its employees which are the issue and not privatization. In both cases the answer may be that privatization was a more feasible reformist option than taking on trade unions and seeking a much larger prison budget across the board. Opponents in the United Kingdom then remark that its privatized prison institutions are operated at much higher standards and therefore at far greater cost, the extent of which is not disclosed even to Parliament, on grounds of "commercial confidentiality". Opponents believe that the purpose is to have a two-tier prison system, with it being obvious that much lower standards prevail in the public sector, which will in turn provide a justification for further running down the public sector. 48/

(d) The most effective way to provide work for prisoners is through private sector involvement. The need for prisoners to perform useful work is founded on belief in work as a manifestation of human dignity and self-esteem. It is also thought that work is rehabilitative. Furthermore, in an admixture of economic and moral thinking, it is urged that if prisoners fail to work they are unable financially to support either themselves or their families and add to tax payers' burdens, which in turn reflects on the prisoner's dignity by his failures in these respects. In short, combating the demoralizing effect of prisoner idleness, aiding in rehabilitation and pre-release preparatory work and generating revenue for the State were seen as coming together. 49/ Such motives have led to more state-run industries and to work for private companies within the confines of the institution or outside. 50/ If the alternative is prisoner idleness, it is asserted to be morally compelling to accept private involvement. Such involvement has not

been opposed other than by labour unions who fear exploitation of cheap labour. Penal reformers are all concerned to ensure that unfair exploitation does not occur and therefore advocate enforceable health, safety and wage standards whenever persons work, whether for the public or the private sector. Furthermore, although ILO Convention No. 29, with its requirement that prisoners' work for private persons must be voluntary, has not been universally ratified, some states in the United States have similar statutory requirements. The relatively small experience by 1985 indicated that prisoners obtained better pay from the private sector and were willing to work. 51/

(e) The ideological justification for prison privatization is that the size and scope of Government activity should be reduced and that operations should be decentralized. In particular, it is thought that the civil service has become a rigid traditionalist bureaucracy with consequential inevitable mismanagement and a stream of unenforceable circulars dispatched to prisons. The Government of the United Kingdom has in recent years formulated and applied a policy of making public services accountable to citizens and of achieving improved quality of services. Referring to the Government's having proceeded "on an heroic scale" with reforms of the public services, the Secretary of State for Home Affairs explained:

> "We must maintain the momentum for change. We have already challenged the monoliths which were arrogant twice over. They decided what the needs of the people were; and then they decided how they were to be satisfied." 52/

The opposing view, which the Secretary of State denied had any "ideological justification", is that custody and care of prisoners should be a public sector monopoly. 53/

(f) A mixed economy within the prison system of both public and private providers is urged as being more efficient, because of the salutary effect of competition. This has been well explained by the United Kingdom Secretary of State:

> "The stimulus of competition will raise standards throughout the prison system. More providers will mean more innovation, better value for money and more bases for sensible comparison between the best and the worst in the system. In short, a better deal for prisoners and a better deal for the public. In the prison service as elsewhere there needs to be a constant, rigorous search for improvements in both quality of service and value for money. That is what competition will stimulate. Prisons are not some unique human activity which should be sheltered from the benefits of competition in a centrally controlled monopoly for any longer. The failings of the British Prison Service are a perfect example of the failings of centrally managed monopoly in any walk of life". 54/

Under a mixed system the public sector also makes bids for the management of prisons (whether new or rehabilitated) by a process known as "market testing", with the bid from either sector which affords best value for money in relation to the specified outputs being accepted. "Market testing" may

have been conceived as a form of "gingering-up" the public sector, but, once corporations get into the business of provision of prisons, they will be anxious to compete in this market. Recognizing this, the Government of the United Kingdom envisages

> "an increased role for the private sector in managing prisons to provide a source of competition and new ideas". 55/

A further claimed advantage of using private sector services with the appropriate level of skill will be rationalization of overlapping services, in particular use of the private escort service to release skilled police and prison staff for their professional duties. 56/ So far as concerns skill, opponents argue that training standards for the private sector are at a lower level than that in the public sector, despite the safeguard that each private sector prison custody officer must be certified by the Secretary of State as not merely a fit and proper person but as trained to an appropriate standard. However, at least one public service prison governor has approved private sector training methods, vetting procedure and standards in "the best jail I have ever seen". 57/ In contrast, a survey of the same prison after one year of operation was critical of Government refusal to reveal basic staffing information and found that there was a crisis of staffing levels. 58/ Public sector trade unions opposed to privatization also point to the serious problem of low standards in the private security industry, which forms part of the consortia to operate prisons. 59/

(g) Cost has been put forward as an answer to the fiscal problems in the United States where publicly-approved taxes could not be raised to build new prisons. It is also claimed that private sector prisons are cheaper (give better value for money) and allow money to be redirected to rehabilitatory programmes and improved conditions. This is because private construction firms can produce new, better designed prisons more quickly and cheaply and can effectively contain running costs by employing fewer staff, who will not be members of unions with restrictive practices and unnecessarily generous terms of service. Some of the figures produced in Australia show great public savings. 60/ In the United States there was both optimism about potential savings of 25 per cent on running costs and pessimism that in such a long term business as prisons the outcome would not be profitable. 61/ Results in the United States are disputed and failures both as to financial viability and as to standards are raised by opponents. 62/

The current view about cost benefits is well summed up by an American author:

> "In practice, the switch to private prisons has proven less costly for some and more costly for others. Examples of cost savings and cost overruns in both public and private prisons make it exceedingly clear that the performance of public prisons has not been invariably bad, and the performance of privately-run prisons has not been invariably good. At best, the public should remain sceptical of claims that private prisons will save taxpayers money. What data there is provides absolutely no basis from which to conclude private prisons will operate any more efficiently or at any lower cost to taxpayers than public prisons". 63/

In the United Kingdom there are difficulties in making comparisons, but thus far it appears that the public sector is cheaper than the private sector with its stipulated higher standards. 64/ A danger in the longer run is that although initially the market is competitive, an entrenched industry develops, at which stage competition disappears and cost benefits with it. 65/ Even more serious is the risk that if the State cannot return to a competitive market to rebid the contract, sanctions for misfeasance will not be effective to halt even detected abuses. There will be constraint and reluctance to penalize the firm heavily enough to drive it from business either at the end of a contract or during its currency, because it will be a logistical nightmare to switch at a time when competitors are unavailable and the State has run down its own prison service. 66/

(h) Private participation in prisons will be an opportunity for creating wealth. An official United States study in 1985 pointed out that:

> "Straight leasing provides investors with capital appreciation and non-cash losses with which to offset cash income for tax purposes, including depreciation and investment tax credits. Lease/purchase arrangements allow investors to deduct from their taxes the interest component associated with periodic lease payments. Both straight leasing and lease/purchase offer the investor a steady cash flow and early return of invested capital". 67/

Opponents believe profit to be a distorting factor in the treatment of offenders and, while accepting that private sector employees can be as altruistic as those in the public sector, reject the notion of non-charitable corporations continuing to operate prison businesses without regard to profit, especially in the long run. Critics point to an inherent conflict of interest between profitable operation of prisons and improving conditions for prisoners. They assert that the need to maintain profits will cause private prison companies to reduce their staffs and programmes, since staff comprise the largest part (more than 60 per cent) of prison budgets. 68/ In short, they believe that in privatized prisons conditions will in the long run deteriorate because of emphasis on cost considerations, whereas States, once budgetary provision has been made, spend the money as allocated. 69/ The real issue is whether the human rights of prisoners will ultimately be violated by conditions in prisons which will reduce their residual liberty, result in degrading treatment or deny rehabilitatory measures as a result of profit-oriented decisions. The answer may be that State monitoring and safeguards can preclude that - something which will be sketched out below.

B. Analysis of further principled policy arguments advanced against prison privatization and some prudential ones

45. In addition to countering policy arguments put forward by supporters of prison privatization, opponents put forward five principled policy arguments against contracted out management, including not only the transfer by the State to a contractor of management of all aspects of a prison, but also cases where, although State supervision is retained, custodial functions and administration of punishment are undertaken by a contractor. These five arguments are:

(a) Disciplinary powers and functions should only be exercised by the State, because discipline inside institutions depriving persons of their liberty can result in diminution of their residual liberty or prolongation of their confinement and is a quasi-judicial power which, both procedurally and substantively, is only appropriate for State exercise;

(b) Force to restrain prisoners should only be exercised by the State;

(c) Liability for violations of human rights (potentially frequent during periods of imprisonment) must be a State responsibility, whereas the interposition of third party private contractors and their employees, combined with municipal systems of delictual liability, will too often result in denial in practice of effective remedies;

(d) The State must maintain accountability and public visibility of the criminal justice system with access by the public to information, so that the system can be perceived as functioning justly and the people, as sovereign, are provided with information to govern responsibly, whereas, with private sector interposition, operations will be obscured by commercial confidentiality and only State officials will be able to monitor, a function which experience in many fields of government has proven officialdom incapable of adequately executing;

(e) Symbolically speaking, only the State should have powers of administration of justice and of executing it by coercion, because the legitimacy of such inherently governmental powers entrusted to the State by the people depends upon their exclusive exercise by the State.

Although these arguments of principle may to some extent be met by safeguarding arrangements (listed in section D below), they remain relevant as additional reasons why a system of State contracting out of management of prisons might be an unlawful subdelegation of power (examined in section C below).

46. There are also two further prudential arguments by opponents, partly repeating their contentions set out in section A above. The first of these is that the day-to-day administration of the punishment of imprisonment gives great potential for invasion of human rights. Even if it is not dictated by policy that the State should not subdelegate this duty to private persons, practical wisdom dictates that private persons should not be invested with, inter alia, the following powers: to prolong imprisonment through reports or even disciplinary decisions on prisoners; to classify prisoners - something affecting their ability to obtain remission; to determine the periods for which prisoners are in cells and denied association; to censor material in their cells and correspondence; to restrict rights of religious observance to essential and obligatory practices; to invade privacy by having access to inmate records; and to force them to labour for a contractor. Nor is it wise to entrust private persons with the duty of ensuring the safety of prisoners against violence by other prisoners, especially in the cases of defective personalities charged with or guilty of child abuse or prisoners perceived as weak or young who are frequently subjected to homosexual rape. 70/ Furthermore, it can be urged that for punishment to be administered to a prisoner by private corporations through their employees is per se degrading

punishment: it does not show respect for the inherent dignity of the human person to provide for imprisonment by, say, "Incarceration, Inc." or the "Mickey Mouse Prison Company Ltd." (especially bearing in mind the associations of some construction and security firms). The expectations of imprisoned persons must be that they will be imprisoned by the State to whose jurisdiction they have submitted or been subjected.

47. The second argument about the unwisdom of involving the private sector is based on the standards of training of staff, which affects their capacities and attitudes, and on staff conditions of service resulting in over-long hours on duty, which result in exhaustion and negative attitudes rebounding on prisoners. A particularly important failure is likely to be in relation to private sector duties in regard to racial discrimination and staffing policies to ensure its absence. 71/ Because the contract specifications are what the parties have agreed, unless there is express provision requiring the contractor to follow updated State guidelines and circulars concerning the prison service, these are not binding since they would vary the contract. Thus contractual inflexibility means inability to implement the most recent reformed standards - except as part of a later review of the contract. 72/

48. The issues raised in the first major policy argument about the impropriety of private sector involvement in disciplinary matters are precisely put, so far as concerns arrangements under United States municipal law, by an American author:

> "Also rooted in the police power of the state is the authority to classify inmates, determine what types of conduct can be punished within the institution, and provide for disciplinary proceedings sometimes resulting in sanctions imposed on the inmate. All of these functions affect the length of the inmate's confinement. In most jurisdictions, classification determines how much good time an inmate can earn. Any disciplinary action taken against an inmate goes on his record, which may affect his eligibility for parole. In addition, loss of good-time credits as a result of disciplinary action can increase the length of his confinement. These functions are tantamount to sentencing decisions. Can the private sector define punishable conduct, sanction the inmate, and prolong his confinement?" 73/

Put more analytically, disciplinary aspects range from drawing up a code of discipline defining what is punishable and the sanctions; decisions on the classification or categorization of offenders who are consequentially subjected to differential prison regimes; reporting (with recommendations) on incidents in prison; searching, arresting or restraining disciplinary offenders; bringing disciplinary charges against them; giving evidence at any hearing or adjudication; making findings and imposing punishments, including, inter alia, solitary confinement (loss of residual freedom of association and of liberty), 74/ additional days (in case of an automatic early release system) or of "good time" (in a conditional release system), in either event prolonging imprisonment; making appellate decisions; execution of the award of punishment; and reporting on the events and verdicts to parole or licensing authorities whose decisions will be influenced thereby. It will be obvious that some functions are adjudicative and other accusatory, but that all are quasi-judicial and concerned with the administration of criminal justice.

49. Taking account of the concern that private prison operators should be involved in all these functions, a few states in the United States have subdelegated only some of them to private prison contractors. Others have subdelegated all such functions. 75/ In order to retain State control, the model in England and Wales is to have a central set of rules, guidance as to classification by a State-provided data base (LIDS), judgment in disciplinary proceedings by the controller and appeal to the Head of the Remand Contracts Unit, leaving the contractor the other functions. The contractor's prison director may only in cases of urgency order either removal of a prisoner from association, temporary confinement in a special cell or the application of any other special control or restraint. 76/

50. An important concern, because of the discretion accorded prison officials and the reluctance of courts and government authorities to intervene, is that disciplinary powers will not be exercised because the initial steps of reporting and restraint will not be taken by employees of private contractors. Turning "a blind eye" and absenting themselves from inter-prisoner assaults, drug abuse, etc., has grave effects on the human rights of prisoners who are assaulted. This phenomenon is being manifested in newly-privatized prisons, 77/ just as it was in former times when prisons were under private management. It has been alleged in the United States that there is reluctance by private prison firms to initiate disciplinary proceedings, because of the expense of involving guards in disciplinary proceedings and of the risk of prisoner litigation. Private guards are even less likely than public prison officers to wish physically to intervene in the big business of drug dealing in prison, where assaults are a frequent consequence. It should be added that victimized staff are psychologically affected and their resentment is displaced onto prisoners in general.

51. The second major policy argument that the State should have a monopoly of force in relation to prisons is along the following lines: prisons are necessarily characterized by security requirements and, having regard to their population, are places where the use of force is inevitable continuously at fluctuating levels and not infrequently on a large scale, with the possibility of injuring persons innocently involved; physical personal constraints are not infrequently required at least by way of handcuffs, forcible search and sometimes more; there may be use of dogs by dog handlers; there will always need to be measures to prevent escapes, to stop prisoner fights and to end riots; there must be trained control and restraint teams; there must be contingency teams for large-scale violence; force of such an extent cannot be provided by relying on the powers of the private citizen to defend himself or others or by relying on the uncertain scope of the citizen's right to use reasonable force to arrest persons or prevent their escape in relation to major offences; in short, only the State itself, through its employees, can exercise appropriate powers. More crucially, apart from the limited powers of private citizens, which is what contractors and their employees are, no citizen can invade other citizens' (prisoners') rights to bodily integrity, security of the person or other relevant human rights.

52. This argument is recognized to various degrees in different States. In the United States some states have conferred special authorization on private guards to prevent escapes and accorded them protection from liability if deadly force is used. Sometimes they are "deputized". Other states use

public correctional officers as perimeter security. In England and Wales some statutory power to use reasonable force where necessary to ensure good order, discipline, the prevention of escape, the prevention, detection and report on commission or attempted commission of unlawful acts, or to attend to prisoners' well-being is given prisoner custody officers. 78/ It is accepted that there is a need, if such powers are given, for adequate screening and training of such officers. 79/ It is also accepted that suppression of major difficulties in privatized prisons is a matter for the State, at which time the Secretary of State is empowered for a period to appoint a Crown servant as prison governor. The governor will exercise all the private prison director's or the controller's functions. In fact, the army, the police or State prison service will be called in to restore order.

53. The third major policy argument is that if there is prison privatization, remedies for violations of human rights are likely more frequently to be denied because of the limited scope of municipal delictual/tortious liability and the presence or absence of a specific remedy for violation of human or civil rights. This is of less concern where victims are aliens, because the law of state responsibility makes the State liable internationally. The same position applies where the State has accepted the right of individual petition in respect of a global or regional human rights instrument. However, the great majority of prisoners are nationals and many States have not ratified such instruments.

54. It is inappropriate in this outline to examine the technicalities and deficiencies of municipal delict/tort law, except to make the point that this affects State liability to prisoners assaulted by guards, to fellow prisoners assaulted in prison and to members of the public whose rights may be violated following prison escapes. The municipal law of States often confers inadequate protection when State employees abuse their authority. It will a fortiori be easier for a State made more remote by the interposition of a contractor, and possibly even a contractor's subcontractor, to avoid liability for such persons' employees' defaults and misfeasances. 80/

55. Major Common Law States, who are the leading proponents of prison privatization, have so framed their regulations governing prison life that these are merely regulatory and not mandatory. Accordingly, these do not create rights which in the event of breach can give rise to action. 81/ In such cases there remains the possibility of State disciplinary action against defaulting State employees. Even that deterrent possibility disappears with private contractors and their employees. Nor could there be liability by way of the tort of misfeasance of public office, since such persons are not public officers. Similarly there is doubt whether they would be amenable to proceedings by way of a public law remedy such as judicial review. An example illustrates the point: if in breach of the Prison Rules for England and Wales private guards placed a prisoner in a strip cell for several days and treated him with a degree of indignity, but he was then returned to his ordinary cell, the prisoner would have no remedy against the State, the contractor or his employees because no pecuniary loss would have been suffered (necessary for a claim in negligence); there would have been no false imprisonment because he was in prison under authority; there would be no action for breach of statutory duty because the Prison Rules do not confer such a right; and, because it is doubtful whether the facts are of such a degree as to constitute

an assault, such a claim against the contractor's employees may fail; even if there was an assault, neither the State nor the contractor would be liable because the employees would have acted outside the scope of their actual and ostensible authority and will have been forbidden so to act. The example emphasizes the limitations occasioned by the law of vicarious responsibility. 82/ Furthermore, because the United Kingdom does not have a comprehensive Bill of Civil Rights, there is no remedy for violations of human rights as such. Ability to sue an actual perpetrator without assets (private contractors' guards) little avails a victim of a human rights violation. Although in similar circumstances the State is also not liable, as a matter of practical politics it frequently makes payment on an ex gratia basis. In contrast, with privatization this will not occur and there will then have, after exhaustion of domestic remedies, to be applications to the European Commission of Human Rights. Those applications will raise questions about the State's responsibility for the actions of third parties. 83/ This indicates a systemic failure regarding State liability for violation of human rights of prisoners and for which the State should assume liability, because there will have been illegitimate use of power, functions and the de facto position conferred by the State, with such power, functions or position being used for ends different from those contemplated.

56. In the United States 42 U.S.C.A. $ 1983 permits suits against states acting through their designated officers, or where the State creates a situation where private interests deprive individuals of their constitutional or statutory rights, or where functions traditionally or normally performed by the State are delegated to or performed by private interests. It is clear that "state action" or private action "under color of law" will be present when prison contractors or their employees invade constitutional rights. 84/ If the invasion is not of a degree which the court finds to be cruel or unusual punishment or in violation of due process, no remedy will be available. The courts have been deferential to prison operators as to what they find violative and are reluctant to intervene in prison authorities' decisions. They have held that because prison problems are complex, requiring

> "expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of Government,"

courts should not interfere except in case of the most egregious abuses, and have applied this reasoning to allow punitive isolation of inmates, restriction of mail, multi-cell occupancy, prohibition of visits and limited eligibility for rehabilitation programmes. 85/

57. The prisoner is often both punished and victimized: in addition to his imprisonment, he is at serious risk from his fellow prisoners. In the United States in 1987, 6.5 per cent of federal and state inmates were in protective custody, a form of segregated confinement intended to provide enhanced safety for likely targets of inmate violence, but where the conditions are similar to those imposed as punishment for disciplinary infractions. 86/ Failure to transfer to protective custody may result in serious assaults on prisoners for which they would seldom have a remedy against the State, mere negligence in respect of harm to inmates not giving rise to liability. 87/ Such events are likely to be more frequent with

private contractors, where profit-seeking and reduced numbers of staff create even greater potential for abuse. The guards will not be liable for harm caused and the assailant will have no means to pay damages, whereas it was being in prison which caused the prisoner to be subjected to violation of his rights.

58. A final point, shifting from public to private administration of prisons affects prisoners' safety. In all prisons a fundamental social rule is absence of complaint by victims of co-prisoner violence, because of the retaliation and contempt following giving information. For this reason prisoner behaviour requires constant scrutiny and generous staffing. The private sector will have no incentive to provide the latter, so that deficiencies in the municipal law of liability for maltreatment of prisoners become even more significant. One way of mitigating this (already adopted for United Kingdom privatized prisons) is to specify in the contract that the contractor must be well insured for public liability (which will protect against claims by members of the public in or out of prison), but this does not deal with the deficiencies of the law of delict/tort which is primarily fault based. It may be that the only safeguard would be absolute liability in respect of safety of persons, combined with compulsory insurance, 88/ which would consequently reduce the cost benefit to tax-payers.

59. The law of State responsibility has been rapidly developing. According to the International Law Commission's Draft Articles on State responsibility (as formulated since 1985) States are injured if the right infringed by the act of another State arises from a multilateral treaty or from a rule of customary international law and it is established that the right has been created or is established for the protection of human rights and fundamental freedoms. 89/ Prohibition of cruel, inhuman or degrading treatment or punishment can now be said to be a norm of customary law, although the content of the norm still gives rise to difficulties because of some uncertainty around the penumbra of facts characterized as contravening the prohibition. At all events, State Members of the United Nations must be concerned if the internal law of States, particularly where there is prison privatization, systematically fails to secure human rights recognized in the International Covenant on Civil and Political Rights and by customary law. So long as there is such doubt as to liability and remedies, it is a strong policy reason for privatization of prisons to be considered potentially violative of human rights.

60. The fourth policy argument about the necessity for clear public accountability for the operation of the criminal justice system, including prisons, has several aspects. First, there is a need for the people as sovereign to be kept informed and to have the right to seek information (an art. 19 issue) in order to be able to evaluate government performance and to govern responsibly. Second, there is need for the public to see and therefore to ensure that the State's duties of providing conditions of imprisonment in accordance with human rights are being properly performed. Third, in order for there to be confidence in the criminal justice system, that system must be perceived to be functioning, 90/ so that secret State monitoring will not suffice. Fourth, monitoring is a difficult and costly task, undertaken often without knowledge of the private firms' internal financial data and decisions and one in which officials identified with particular penal policies are

reluctant to investigate abuses because of their own association or because of the problem of finding alternatives. 91/ Fifth, ultimate public control and responsibility must be retained and thence a power by the Government to give directions either through a Minister or through a regulatory agency directly under a Minister. Likewise the courts must retain control. The necessity for powers of control gives rise to difficulties in relation to prison privatization when it takes the form of contracted-out management. Because the relationship is contractual, unless specified exceptions have been written into the contract or are implied by law, the State is limited by the contractual terms. Thus, apart from subsequent contractual modification, or overriding statutory powers, the State cannot bind the contractor to new penal arrangements or standards. Nor is the contractor amenable to public law remedies for defaults, only contractual and delictual/tortious remedies being available. 92/

61. The information aspect is so significant that it is necessary to spell out what it entails. Unless there is public visibility of information about private prison companies, including major shareholders, finances, contract prices, costs, the final contract with standards required, standards observed, staffing, with details as to professional categories and grades, training schemes, conditions of service, contingency arrangements and notice periods, it will be impossible to assess whether concerns by the public and prisoners about prison standards are being met, whether problems have occurred, and what may be brewing. Hitherto there has not been full disclosure of all these aspects: in Queensland, both standards and financial provisions are treated as commercially confidential; in England and Wales, financial details, staffing details, profit levels, contingency plans, periods of notice, etc. are all kept "commercially confidential" with the responsible Minister refusing to give such details. 93/

62. Reports by the controllers of contracted-out prisons in England and Wales are made only to H.M. Prison Service (an agency which is part of the Home Office). They contain management information and are regarded as confidential. Nor will reports on service delivery be published. Neither is an annual report by the contractor or the controller envisaged. Instead, H.M. Prison Service's Annual Report will contain some information about performance in both public and privately operated prisons. 94/ There will also be independent boards of appointed Prison Visitors who may publish reports; the Home Affairs Select Committee in Parliament will receive evidence from the Minister and Home Office civil servants; and there will be inspection (approximately biennially) by the Chief Inspector of Prisons.

63. A particular concern is that although the chief source of public information will be reports by the press and by charitable foundations, such as the Prison Reform Trust, their publications will be subject to libel suits by private contractors. The English law of libel does not confer the same protection to comment on the activities of corporations or persons in the public realm as does American law, where freedom of speech is in the public interest, provided the comment is in good faith and not malicious. Nor is there a prohibition on prior restraint. Private prison corporations will therefore be able to issue gagging writs. In contrast, were prisons publicly administered, the law of libel would be inapplicable because a public body cannot act as plaintiff in libel litigation. Thus in England and Wales the

change from public to private prison administration in effect puts a legal chill on public criticism of private prisons, unless the criticism is within the limits of the strict Common Law of libel. Only in Parliament will it be absolutely safe to criticize the administration of privatized prisons.

64. The fifth major policy argument is that symbolically only the State should have the power to administer justice and to execute it by coercion, because only then will justice have legitimacy in the eyes of those subjected to it. 95/ Central to this question is where Governments get the power to punish and whether punishment is legitimate if effected by an entity other than Government. The Government, according to modern theories of the State, is permitted to exercise such power because of the concept of the social contract, whereby people contract to form a State, turning over to it their power to create and enforce rules in return for protection by the State. Under that contract members of society agree to accept the laws of the State and to allow it to punish them for violation. John Locke, the major early modern proponent of social contract, first formulated a political doctrine of non-delegation of legislative power, although long before him Henry de Bracton (1250) had enunciated the notion that the king could not delegate the jurisdiction entrusted him, for the crown of the king was to do justice and judgement. 96/ Bracton took over terminology from Roman and Canon law to deal with the problem of delegation of jurisdiction. He argued that the king was bound by a "trust", not only from God but from his subjects. 97/ The king was "created and elected" to sustain and defend justice and he could not convey those rights because he held them as trustee. 98/ Bracton was not alone in his thought. The notion of entrustment of jurisdiction by the people had deep roots in the constitutional traditions of European States. 99/ Indeed, writings by political theorists of the middle ages about pacts and contracts between the ruler and the folk (people) were not merely metaphysical speculations, but legitimate conclusions about the recognition of rulers by the community (people) on whose consent a ruler's authority and jurisdiction depended. The notion that jurisdiction is a trust was the equivalent of the State practice of the middle ages. Bracton's elaboration that jurisdiction cannot be delegated soon passed into general constitutional thought.

65. Although it is difficult to persuade pragmatic thinkers of the importance of political theory (even when acceptance of a particular theory is universal) it is essential, when looking at privatization of management of prisons, to revert to the theory of social contract. An American author sums up the issues clearly:

> "The power of punishment, therefore, has been placed in the hands of the State through social contract, and once an entity other than the State seeks to punish for an offense, the social contract is violated. To remain legitimate, the power to administer punishment and thereby restrict the liberty of those who violate society's laws must remain solely in the hands of public authorities." 100/

This policy reflects the original, and is possibly still the primary, "raison d'être" of government. 101/ Even if administering justice or punishment were offered free by a private prison corporation, or for that

matter by vigilante "police" or hangmen, privatization remains a policy that is contrary to the social contract by which consent of the people to Government was given. 102/

C. Examination of the fundamental basis for State power and responsibility in relation to limitations on human rights, in particular the power to detain and imprison, and possible legal limits on powers of sub-delegation of State duties, powers and functions

66. The preceding policy arguments about State inability to delegate the criminal justice function, including its administration and execution, can be further developed into a rule of international human rights law. This has major theoretical implications for the limits of State power in relation to a State's capacity in international human rights law to place restrictions on the human rights of its citizens. The complex argument is as follows: the will of the people is the basis of the authority of government (art. 21 of the Universal Declaration of Human Rights); all persons are equal before the law and entitled to equal protection of the law (art. 7 of the Universal Declaration); all peoples have the right of self-determination (art. 1 of both Covenants); self-determination includes internal self-determination, namely choice of the form of government; peoples have exercised their self-determination to create States and to endow the governmental institutions of those States (in accordance with law) with power, inter alia, to administer justice and to regulate human rights in accordance with law; "in accordance with law" does not merely refer back to the domestic law, but refers to the need for the law to be compatible with the rule of law or principle of legality; 103/ the rule of law requires the State itself to administer justice and exercise its jurisdiction, conferred upon it by the people; administration of justice is an exclusive prerogative of the State, permitting the State, in accordance with law, to restrict personal liberty, but this is a duty and responsibility of the State itself, which is a delectus persona, 104/ with particular necessary characteristics as trustee of the public interest and as vested with the police power for that very purpose; 105/ citizens have accorded to the State power to perform its duties; the right of the State, accorded to it by citizens to have their personal liberty taken away in accordance with the rule of law, entails also that the State itself takes away that liberty and itself holds the citizen in custody; inevitably the State as an artificial juristic person must act through its employees and agencies; 106/ further sub-delegation to third parties who are not State servants will be a sub-delegation of jurisdiction affecting personal liberty and is impermissible; that principle against sub-delegation of jurisdiction is a constitutional principle which has operated in States since the 13th century and has its origin in Roman constitutional law; it is not in accordance with this principle conceptually to separate the responsibility and duty of the State from the actual performance of the function and to assert that, so long as the responsibility remains with the State, it is in order to sub-delegate the function of exercising jurisdiction, particularly when the function concerned is that of administering justice in contrast with functions of drafting supplementary decrees or of exercising administrative action not affecting personal liberty, in which case sub-delegation in accordance with procedural due process may be proper; the responsibility of the State does not permit it to sub-delegate the power of

giving effect to restrictions on personal liberty, including having custody of prisoners. In short, privatization of prisons by way of contracting out management (control) and custody is not in accordance with international human rights law.

67. A further supporting argument for this view arises if issues not adequately addressed by treaty law and practice are resolved by invoking a private law principle common to the world's major legal systems, thereby interstitially developing the international law of human rights. I refer to the rule delegatus non potest delegare. The argument runs as follows: imprisonment deals with many of the basic rights of the human person; it is subject to international human rights law; and it is not a matter purely within the area of discretion which international law designates as sovereignty. (The obvious point needs emphasizing that municipal law, including even the State's constitution, is no defence to a claim of breach of international law.) States parties to the International Covenant on Civil and Political Rights have by article 2 undertaken to respect and to ensure to all individuals subject to their jurisdiction the human rights recognized in the Covenant and to take measures necessary to give effect to the rights. The Preamble to the Universal Declaration earlier proclaimed that States had "pledged themselves" to achieve promotion of universal respect and observance of human rights. It is essential to decide whether the responsibility is "themselves" to act or merely to supervise and control any sub-delegation, to take care in choosing their licencees (prison contractors) and to discover their activities with a view to control. In deciding which interpretation is preferable, it seems proper to treat as a general principle of law recognized by the community of nations the rule, against sub-delegation, namely, delegatus non potest delegare.

68. The conclusion that human rights law does not allow others than the State itself, acting through its functionaries, to restrict personal liberty, and in particular to operate prisons, is reinforced by the policy arguments (see paras. 45 to 64) concerning discipline, use of force, liability for harm to prisoners, need for accountability and the necessary symbolism of justice and jurisdiction being administered exclusively by the State.

69. Another reason, requiring further study, is the evolution of the international law of human rights. Before that law was recognized, emphasis was on States as sovereign, with the treatment of their subjects being a matter within the domestic jurisdiction. That approach by itself no longer suffices. According to international human rights instruments the self-determination of peoples and the people's will are the basis of government. Limitations on rights and freedoms are to be determined by law solely for purposes of securing respect for the rights and freedoms of others and of meeting the just requirements of public order, morality or the general welfare in a democratic society. 107/ Finally, States have undertaken to respect and to ensure such rights. As was pointed out in the American case of Filartiga v. Pena-Irala, dealing with torture as a violation of international human rights and of the Charter of the United Nations and human rights instruments:

> "Having examined the sources from which customary international law is derived - the usage of nations, judicial opinions and the work of

jurists - we conclude that official torture is now prohibited by the law of nations... The treaties and accords cited ... all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments." 108/

70. When this view is taken in conjunction with the developing law of State responsibility, which is to the effect that States have obligations to other States where rights have been created or established for the protection of human rights and fundamental freedoms (as the International Law Commission reported - see para. 59 above), then, if the internal law of a particular State does not ensure observance of human rights, such a State will systemically have failed in its obligation and will be responsible to other States who will as a result be injured parties. Weighing all the legal and policy arguments about human rights being violated by prisons and prisoner custody being contracted out, it is arguable that States, as a matter of international human rights law, may not engage in that practice of delegating their duties and responsibilities by labelling them as contracted out functions. What they have actually done will have to be evaluated, taking all their arrangements into account and allowing the State a margin of appreciation. None the less, at the end of the day the maxim plus valet quod agitur quam quod simulate concipitur must be applied. Assertion that State responsibility remains may not suffice where it is so tenuous as to be negligible. Arguably, States, that delegate their duties where human rights responsibilities are at issue, will be internationally responsible if they do.

71. It needs adding that certain modes of prison privatization, namely contracted-out management and custody, arguably amount to degrading treatment or punishment, which is contrary to a norm of customary international human rights law.

72. The aforegoing argument is lent support by dicta in the Velasques Rodrigues Case, dealing with forced disappearances, which was decided by the Inter-American Court of Human Rights. The Court made it clear that there were domains to which the State had limited access; that the protection of human rights necessarily comprised the concept of the restriction of State power; and that the State must both conduct itself in accordance with human rights and have in force a system designed to make it possible to enjoy human rights. 109/

73. The acceptance by States of the Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials, as well as, in the case of States Party to the Council of Europe, of the European Prison Rules and, in the case of members of the Conference on Security and Co-operation in Europe, repeated acceptance of the United Nations standards, indicate that State practice is such that prisons must be operated by public officials, despite recent departures from the practice in certain States. This point has been made in Part I above.

74. To allow prison privatization by way of contracted-out custody and management is a failure to provide those guarantees for human rights which are generally considered indispensable to the proper administration of justice. It is a failure to exercise proper control in respect of a type of activity

where the circumstances are such that violations of human rights will occur and where direct State involvement will reduce their incidence.

75. The rule emerges from the aforegoing argument that human rights are to be ensured by the State and that, where they are restricted, this must be done by the State through its governmental organs, judicial, executive or legislative as appropriate. Conversely, any restrictions must not be effected by non-State organs, particularly by politically unacceptable autonomous private bodies.

D. Identification of standards and safeguards necessitated by interposition of private sector involvement in the operation of prisons and treatment of persons detained or imprisoned

76. Study is required of special standards and safeguards necessary in privatized prisons. (Obviously similar safeguards are desirable in State prisons.) The major areas where safeguards are necessary are: 110/

Management and contract monitoring by the State;

Accountability to the public and the State;

Discipline;

The use of force;

Liability for safety of prisoners;

Work by prisoners.

77. Management and contract monitoring (to whatever extent that contracting out is considered lawful) must be under State supervision. There seems to be a need for developing a United Nations standard in the form of minimum rules to govern State practices of contracting for private management. Inter alia, there seems need to require:

(a) Detailed specifications, clearly and concretely defining the services to State and prisoners to be provided by contractors (e.g. including number of hours out of cells, programmes, meal times, limits on number of inmates, psychiatric help, etc.);

(b) Scrutiny of ownership of prison companies, both at inception of contract and upon transfers of ownership of shares or on changes in corporate management;

(c) A system of performance incentives to encourage contractor compliance with standards, including assessing results by rehabilitation and diminished recidivism;

(d) Prohibition of per capita per diem bases of remuneration to discourage "the Hilton Inn" mentality of keeping prison beds full and payment instead on a lump sum basis;

(e) Maintenance of competition by a prohibition on monopoly or oligopoly by large prison contracting firms combined with maintaining a State prison service;

(f) Frequent reviews of contractual terms;

(g) Requirements of staff training of contractors' employees to at least the same levels as in the State system, possibly in the State system;

(h) Responsibility of contractors' employees being reinforced by requirements of oaths of office, duties of confidentiality to maintain prisoner privacy and sanctions for misconduct at least as effective as against State guards;

(i) A permanent presence by State officials to control the prison and perform essential non-delegable functions;

(j) Strict monitoring of the contract by State officials resident in the prison;

(k) Frequent inspections.

78. Accountability and public visibility dictate, inter alia, the following requirements:

(a) Reporting procedures, whether by State officials resident in prison, State visiting monitors, or State inspectors, with reports being made public on a frequent and regular basis to the legislature, whereupon access to the press and public follows;

(b) Appointment of an Ombudsman;

(c) Regular surveys of prisoners to report on prison experience;

(d) Judicial review on a generous basis, bearing in mind that it will not be State officers but private corporations and their employees, who are not entitled to the deferential treatment courts accord State officials;

(e) Press and researchers' access to prisons and prisoners on a frequent basis so as to keep the public informed;

(f) Full disclosure of financial aspects of the prison contract, including staffing requirements, costs and profits;

(g) No transfer of prisoners to privatized prisons outside the State's jurisdiction - in order to maintain accountability.

79. Discipline needs to be governed, inter alia, by the following standards:

(a) A code of discipline clearly specifying prison offences and sanctions;

(b) The code must be drawn up or at minimum approved and promulgated by the State;

(c) Mandatory procedural rules as to the running of prisons;

(d) Procedures to incorporate a fair hearing, with representation at disciplinary hearings for all "punishment" including solitary confinement (except in urgent cases and then as soon as possible thereafter);

(e) Review procedures by senior State officials;

(f) Judicial review on grounds of unlawfulness, but generously exercised;

(g) Classification of prisoners by State officials;

(h) Automatic accrual of time for "good behaviour";

(i) The contractor may not discipline prisoners;

(j) Where reports by the contractor result in denial of parole, the prisoner or his lawyer shall be entitled to see these and to seek a review.

80. The use of force needs, inter alia, the following standards:

(a) Restraints and force by the contractor and his employees must be employed only in clearly defined and limited circumstances;

(b) The contractor and his employees must be well trained in purposes and methods of peaceful restraint and control;

(c) Major incidents requiring possible use of force must be dealt with by State officials.

81. Liability for safety of prisoners seems to need, inter alia, the following:

(a) Absolute contractor and State liability for assaults on or misconduct towards prisoners by guards;

(b) Rapid transfer to protective custody by prisoners requesting it and absolute liability if during any delay the prisoner is assaulted;

(c) Public liability insurance by the contractor for his firm and his employees, whether or not he is vicariously liable;

(d) Stipulations that the State may certify liability, whereupon the insurance company may merely dispute questions of the amount of the award of damages.

82. Work by prisoners in prison-based industries or outside prisons as part of pre-release programmes needs, inter alia, the following standards:

Conformity with the ILO Forced Labour Convention, 1930 (No. 29);

Voluntariness by the prisoner;

Conformity with article 7 of the International Covenant on Economic, Social and Cultural Rights;

Upkeep of appropriate social security payments (e.g. unemployment insurance) by any employer;

Safe conditions of work;

Compliance with minimum wage standards;

Workmen's compensation benefits;

Clear definition of permissible deductions from wages for family, court fines, victim compensation, taxes, and maintenance;

Frequent State inspection of working conditions.

IV. THE SCOPE AND STRUCTURE OF A POSSIBLE STUDY

83. It is submitted that the amplitude of the motives for States to begin or expand prison privatization is fully documented in this outline study. What, however, needs further specialized study is:

(a) The legality in international human rights law of privatization of prisons or contracted-out management;

(b) If such privatization is permissible, the extent to and conditions upon which particular functions can be sub-delegated to private contractors;

(c) Whether a set of United Nations standards for privatized prisons' (functional arrangements) should be developed;

(d) What detailed safeguards should be specified in any standards as being minimal and/or advisable;

(e) What is the most appropriate way of ensuring monitoring by United Nations human rights bodies, for example, by the Sub-Commission Working Group on Detention, by the special treaty bodies concerned with the enforcement of the Covenants and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, by the ILO Committee of Experts in so far as concerns privatized prison-based industries, or by a Special Rapporteur.

A. Sources of information

84. The suggested sources of information should be:

(a) A questionnaire to the Governments of States and to interested non-governmental organizations, seeking detailed information as to the extent,

if any, to which prisons are subject to privatization, whether by way of management, prisoner work or private sector provision of services, together with information as to safeguards and their effect;

(b) Expert penological advice as to appropriate safeguards and their evaluation;

(c) Expert international law advice on the interaction of human rights law and the law of State responsibility, possibly from one of the International Law Commission's Special Rapporteurs on State responsibility.

B. Suggested guiding principles

85. Existing multilateral treaties, in particular the International Covenants and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, should provide parameters and indicate the spirit in which the study should be conducted.

86. The Universal Declaration on Human Rights and its spirit will provide further guidance.

87. The current United Nations norms governing the administration of justice, notably the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment will provide yet further guidance.

Notes

1/ See E/CN.4/Sub.2/1988/28, paras. 10, 47, 48 and 50.

2/ See E/CN.4/Sub.2/1989/29, paras. 32-39 for a summary of the debate and para. 40 for the recommendation.

3/ See Sub-Commission decision 1989/110 of 1 September 1989.

4/ See E/CN.4/Sub.2/1991/56.

5/ See Sub-Commission decision 1991/105 of 28 August 1991.

6/ See E/CN.4/Sub.2/1992/21. As at 4 August 1992 replies had been received from the Governments of Cuba, Egypt and Turkey. The Friends World Committee for Consultation had also sent a reply.

7/ E/CN.4/Sub.2/1992/22.

8/ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. The Rules are reproduced in

Human Rights: A Compilation of International Instruments, United Nations, New York, 1988, pp. 190-209.

9/ 507 F. Supp. 1117 (D. Conn. 1980) modified on other grounds 651 F.2d 96 (2d Cir. 1981).

10/ In commenting on the meaning of "authority" in the Body of Principles, Tullio Treves contends that "'authority' corresponds to the concept developed in international law as regards imputability to States of acts of their agents": 84 Am. Journal of International Law, April 1990, 578-586 at p. 580. According to the law of State responsibility the acts of State organs and of officials (sometimes even when acting ultra vires) are imputable to States, but those of private persons are not.

11/ Adopted by General Assembly resolution 34/169 of 17 December 1979. The Code of Conduct is reproduced in Human Rights - A Compilation of Instruments, pp. 226-232.

12/ Adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session. Entered into force on 1 May 1932. The Convention is reproduced in Human Rights - A Compilation of International Instruments, pp. 166-178.

13/ 21 Detained Persons v. Federal Republic of Germany (3134/67; 3189-206/67) Collection of Decisions 27, 97.

14/ R.V. Ericson, M.W. McMahon and D.G. Evans, "Punishing for Profit: Reflections on the Revival of Privatization in Corrections", (1987) Canadian Journal of Criminology, vol. 29, p. 363.

15/ Some provincial Canadian experience by 1986 is illuminating as to the scope of private sector involvement in the penal system. See Ericson and others above, pp. 364-365:

> "In a publication with the revealing title, Everyone's Business, the Ontario Ministry of Correctional Services enumerates the areas for its 300+ contracts: the operation of community resource centre residences (the 'hardest' it gets); the administration of community service order contracts; drug and alcohol awareness programmes; bail supervision; life skills training; employment programmes; and special services for native offenders. A statement by the John Howard Society of their penal involvements in Ontario indicates their soft-end orientation, even when they enter into the institutional sphere: prevention (juvenile education, community education); early intervention (attendance centres, juvenile drug and alcohol counselling, youth employment service, literacy and/or life skills, juvenile group work, juvenile counselling, juvenile community service orders, juvenile victim/offender reconciliation/restitution); courts (bail verification, bail supervision, probation supervision, victim services, victim/offender reconciliation, restitution, counselling the developmentally handicapped, fine options, youth residences, community service orders, driving while impaired

programme); institutional (remand visiting, inmate counselling, temporary absence supervision, release planning, advocacy, recreation, groupwork, chapter [inmate group] support, federal community assessment, family support); and post-institutional (family counselling, voluntary counselling, federal parole supervision, employment service, groupwork, residential centres, intake and referral, inhouse workshops).

"This range of activity for non-State agencies at the soft end of the penal system is part of the wider 'informal' justice and community control movement. State agencies, and the large non-State agencies they contract with, mobilize citizens to become more involved in controlling each other through prevention, surveillance, and service delivery. Citizens are to be watchers as well as watched, the bearers of their own control. They can do so by paying for it, contracting with private security firms. They can do so by getting involved in it, becoming paid employees or volunteers for non-State control organizations."

16/ Some criminologists point out that the voluntary sector is operated by professionals who, however altruistic their motives for engaging in such work, contractually provide services to the penal system, receive income, promote their careers and further their professional interests: ibid. at 360 and J.R. Lilly and P. Knepper, "The Corrections-Commercial Complex", (1992) Prison Service Journal No. 87, p. 46. See the same authors' article, "An International Perspective on the Privatization of Corrections", (1992) The Howard Journal, vol. 31, pp. 174-191.

17/ The range of participation in penal services is indicated in note 15 above.

18/ A useful short account of the history of prison industries is given in D.M. Haller. "Prison Industries: A Case for Partial Privatization", (1986) Journal of Law, Ethics and Public Policy, vol. 2, 479. The risks of developing a contemporary form of slavery must be precluded by every possible safeguard, in particular prisoner consent (see infra), having regard to historical dangers of prisoner peonage through contracted-out labour. Cf. Ericson, op. cit., pp. 357-358:

"In the United States, and especially in the South, the penal system thrived on its connection to private enterprise. Through a convict lease system, prisoners were not only 'slaves of the State' legally (as enunciated in the classic statement in Ruffin v. Commonwealth, 62 Va. 790 [1871] but also slaves of the local entrepreneurs who contracted with the State to make capital gains from prisoners' labour. Officials in the State capital joined with private capital to profit from the labour of prisoners. In the South, even after the slavery of blacks ended officially, State legislatures passed enabling laws (e.g. regarding vagrancy) which allowed former slaves and other marginal members of society to be incarcerated and hired out for profit. The size of the prison population was determined not by the amount of crime or the need for social control or the efficiency of the police, but by the desire to make crime pay - for the Government and private employees. The Mississippi prison system celebrated the fact that it turned a profit

> every year until the Second World War. It was only in the late 1920s and into the 1930s that legislation extinguished the convict lease system, apparently in response to pressure from rural manufacturers and labour unions who could not stand the competition, especially with the coming of the Depression."

See also J. Dilulio, "Prisons, Profits and the Public Good: The Privatization of Corrections", Criminal Justice Centre, Sam Houston State University, 1 Research Bulletin 1, pp. 2-3 (1986).

19/ Since the coming into force of the Convention on the Rights of the Child similar issues may be raised concerning the widespread practice of detention of juveniles in private sector, but State-supervised, institutions. It may be that the degree of supervision and accountability is such that there has not been a transfer of responsibility. None the less, the argument regarding the State's duty to hold adult prisoners is in principle equally applicable. The only possible distinction is that juveniles are the equivalent of wards of the State and that traditionally their custody and education has been entrusted to private individuals and bodies *in loco parentis*.

20/ R.W. Harding, "Private Prisons in Australia", (1992) Trends and Issues in Crime and Criminal Justice, No. 36, Australian Institute of Criminology, p. 1.

21/ S. Macionis, Deputy Director-General of the Queensland Corrective Services Commission, Conference on Private Sector and Community Involvement in Criminal Justice, Wellington, New Zealand, 30 November-2 December 1992, "The Queensland Experience", p. 6.

22/ Mr. Peter Lloyd, Minister of State, on 18 September 1992, H.M. Prison Service Release, 219/92. A similar stance was taken in a parliamentary answer:

> "The prisons concerned are not being privatized. It is merely the running of them which is being contracted out. It is quite limited ... We are concerned to see that any operation which is contracted out is performed successfully":

House of Lords Debates, 20 April 1993, col. 1370, Earl Ferrers.

23/ See J.G. Miller, "The Private Prison Industry: Dilemmas and Proposals", (1986) *Journal of Law, Ethics and Public Policy*, vol. 2, pp. 465-477, who advocates a new alternative programme truly competitive with prisons. Concerns about a powerful lobby of international security and construction firms, who co-opt politicians and some prison administrators and employ effective marketing techniques to manipulate public opinion, have been expressed in the United States. In the United Kingdom the Prisons Unions Campaign has provided detailed information about interconnections: See *Prisons Services Privatization* TUC Affiliated Prison Unions, London, 1992, pp. 39-65.

24/ Vocabulary and its associations are important. Thus the French Law No. 87-432 of 22 June 1987 relative to the public penitentiary service by its article 5 substituted the expressions "maisons de correction et maisons centrales" in article 719 of the Criminal Procedure Code with "maisons d'arrêt et etablissements pour peines".

25/ For the history of private sector involvement in European houses of correction and prisons see M. Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850, London: Macmillan, 1978 and G. Rusche and O. Kirchheimer, Punishment and Social Structure, New York: Columbia University Press, 1939. For modern re-emergence of private prisons see S. Borna, "Free enterprise goes to prison", (1986) British Journal of Criminology, vol. 26, pp. 321-334 and J. Mullen, K.J. Chabotar and D.M. Carrow, The Privatization of Corrections, United States Department of Justice, National Institute of Justice, February 1985. See also Criminal Justice Associates Inc. (Sexton, Auerbach, Farrow et al.), Private Sector Involvement in Prison - Based Based Businesses: A National Assessment, United States Department of Justice, November 1985.

26/ For example, the prevalence of slavery in much of the world in the nineteenth century will not render contemporary reintroduction of slavery anything other than a violation of international human rights law.

27/ G.C. Zoley, "A discussion of the Wackenhut Experience providing correctional management services in the U.S.", (1992) Prison Service Journal No. 87, 38. Mr. Zoley is President of Wackenhut Corrections Corporation, which oversaw one 150-person facility in 1986 and which by 1992 had become "an international correctional management organization with more than 5,500 inmates". According to the Centre for Studies in Criminology and Law at the University of Florida, the number of secure adult correctional facilities in the United States in November 1991 was 43, with a capacity of 15,476 inmates. Several more facilities were under construction: cited in Centre for Alternative Industrial and Technological Systems, Prison Services Privatization (prepared for the Prisons Unions Campaign), London, 1992, at pp. 67-8. Thus within a year the scale of privatization had rapidly expanded.

28/ L.F. Travis III, E.J. Latessa and G.F. Vito, "Private Enterprise and Institutional Corrections: A Call for Caution", (1985) Federal Probation, vol. 49, No. 4, pp. 11-16, at 10.

29/ Macionis, note 21 above, p. 4. The move to "contract management" as part of correctional reform came about following Mr. J.J. Kennedy's Final Report of the Commission of Review into Corrective Services in Queensland, State Government Printer, Brisbane, 1988.

30/ The successful tenderer for this prison was a consortium involving Wackenhut, which was also involved in a contract for a remand and reception centre (Wacol) in Queensland. See note 27, above.

31/ Andrew Stewart, "Private Prisons Prove their Worth", Business Review Weekly, 3 July 1992, p. 32. Papua New Guinea before its independence had been made up of two dependent territories administered by Australia.

32/ This is part of a consortium including Corrections Corporation of America. CCA is the largest manager of facilities in the United States. It is part of a consortium forming Corrections Company of Australia, which is manager of the Borallon Correctional Centre (344 beds) in Queensland.

33/ Securicor had the contract from 1970 to 1988. In 1989 Group 4 took over the contract after it was put out to tender. In 1987 a parliamentary question had revealed that it was three times more expensive to hold a detainee at Harmondsworth than at an equivalent prison service establishment: Prison Services Privatization, note 27 above, p. 95.

34/ See n. 15 supra.

35/ Originally fonctions de surveilance et de gardiennage had been considered suitable for private sector administration, but, after considering legal difficulties, including the prerogatives of the State and the status of personnel, such management was excluded. See P. Couvrat, "Quelques réflexions sur la loi du 22 Juin 1987 relative au service public pénitentiaire", (1987) Revue Science Criminelle et Droit Penal Comparé, 925. The memorandum by the Government of France emphasized that as part of the prerogatives of the State, it was retaining functions of direction, the functions of the Secretariat and administration and custody and surveillance.

36/ Clear concepts of State prerogative descended from the Royal prerogative have been obscured by the development of Parliamentary Sovereignty as a doctrine in the United Kingdom and her former colonies and by the doctrine of separation of powers in the United States. Obviously some United States southern States enjoy Civil Law inheritances, as does Quebec, but they did not share in the nineteenth century development of droit administratif or parallel systems in continental Europe. United States academics have hotly debated the issue of delegation of power to private sector prison managers. See note 95 below.

37/ J.R. Lilly and P. Knepper, "The Corrections - Commercial Complex", (1992) Prison Service Journal, No. 87, p. 47.

38/ J.R. Lilly and P. Knepper, "An International Perspective on the Privatization of Corrections", (1992) The Howard Journal, vol. 31, 174 at 186. The authors express concern that corrections firms based in Western industrial States will affect the future of punishment in third world countries.

39/ This is well-described in the United States judgement of Morales v. Schmidt, 340 F. Supplement 544, 550 (W.D. Wisc. 1972), rev'd, 489 F.2d 1335, 1344 (7th Cir. 1973):

> "The most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of

measures, all wholly government, or wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others. It is not so, with members of the general adult population. State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or to submit to oral or anal searches after visiting hours, nor have State governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers."

40/ The Rt. Hon. Kenneth Clarke, Secretary of State for Home Affairs, Address at 10th Anniversary Conference of the Audit Commission, 5 March 1993, at p. 10. The motivation is not merely money-saving, but performance to the public satisfaction. On 5 March 1993 the Secretary of State still regarded "the police service" as being "a natural monopoly": ibid., p. 13. Future developments were hinted at by an editorial in The Times, 2 September 1992, which regarded policing as a "service", with the public being "customers" of the police and then needing to decide "how much policing they are willing to pay for, specifying what quality of service they would regard as value for money". The Adam Smith Institute in a recent report, An Arresting Idea (reported in "Private security firms urged to take over from 'bureaucratic' police", Security Management Today, August/September 1991 p. 4) argued for privatization of police training, registration of aliens and other police functions. The free-market think-tank's justification was several experiments in the United States, where small towns favoured private firms instead of a police force to maintain law and order. In June 1993 the Government was considering privatizing certain subordinate police functions such as escorting heavy loads on highways.

41/ D.N. Wecht. "Breaking the Code of Deference: Judicial Review of Private persons", (1987) Yale Law Journal, vol. 96, 815 at 817.

42/ See Colin Jacque, "Privatizing the Court System", The Lawyer, 4 February 1992, P. 19, where the author argues for privatization of "the whole court system save of course for the employment of judges ... The entirety of the structure, including the buildings and staff of the whole court system would be placed in the hands of a Government affiliated corporation ... Court fees would be reviewed, as a considerable expenditure would be involved in the improving of services which presently fail to provide for the needs of the public and lawyers alike ... It would be appropriate to increase such charges to equate with the size and complexity of the problem in dispute ... The aim is to make the entire system self-supporting. This would obviate the necessity of a Treasury financed system of civil justice." The author recognizes that there are requirements of "open and equal justice to all" and that it must somehow be ensured "that small litigants are 'not priced out' by inordinate fees".

43/ J.T. Gentry, "The Panopticon Revisited: The Problem of Monitoring Private Prisons", (1986) Yale Law Journal, vol. 96, 353, p. 354. The reformer and founder of utilitarianism, Jeremy Bentham, in his 1791 Panopticon, proposed to build and run for a fee a specially designed prison, in which prisoners would always fear they were under observation and thus would refrain from misconduct. Revival of the concept of privatizing prison management was also motivated by reform. It was proposed virtually simultaneously by two influential United States sources: a publication by the Rand Corporation and research published by the National Institute of Corrections. See P. Greenwood, Private Enterprise Prisons? Why not? The Job would be Done Better and at Low Cost, Santa Monica, California: Rand, 1981; and S.S. Steinberg, J.M. Keating and J.J. Dahl, Potential for Contracted Management in Local Correctional Facilities, Center for Human Services for the National Institute of Corrections, Washington, D.C., March 1981.

44/ At least one riot (that at Gloucester Prison) was deliberately provoked by officers intent on forestalling reform: Her Majesty's Inspector of Prisons, Report on an Inquiry into Disturbances in Prison Service Establishments in England between 19 April/19 May 1986, H.M.S.O., London, 1987.

45/ See Harding, op. cit., note 20 above, pp. 2 and 7. Politicians seldom publicly voice such criticisms, but in the Home Secretary's Speech to the Prison Reform Trust, 24 March 1993, at pp. 11-12 he said:

> "Public sector prisons must take advantage of the lessons learned from competing against - and working alongside - private sector providers ... There must be a constant drive at every establishment to use the resources available, including staff, as flexibly, imaginatively and efficiently as possible. The objective always must be to find ways of achieving more, in terms of performance, with the same or fewer resources. Improvements in productivity have been the way to improve performance in every service and in every industry throughout history - without greater productivity society today would still be living in Victorian conditions and there are some who claim that parts of the Prison Service are."
>
> Earlier the Secretary of State wrote in The Independent, 22 December 1992, that if conditions specified in contracted-out prisons were not delivered, he could impose financial penalties on contractors, eating into their profits: "That will be more effective than anything I have available for an employed service".

46/ C. Becker, "With Whose Hand: Privatization, Public Employment and Democracy", (1988) Yale Law and Policy Review, vol. 6, 88. The United Kingdom Prisons Unions see the Government's policy of prison privatization as "Taking on the Prison Officers' Association": Prison Services Privatisation note 27 above, pp. 5-6 and 21-23.

47/ See the model performance specifications for correctional centres in Queensland attached to Macionis, op. cit. note 21 above. See also the detailed operational specifications (since amended and strengthened) attached

to Invitation to Tender: Management of H.M. Prison Manchester - Letter of Invitation, 27 October 1992.

48/ Prison Services Privatisation, Prepared for the Prisons Unions Campaign, supra note 27, p. 79.

49/ There is no proof that work is rehabilitative or prevents recidivism, but, as Chief Justice Burger put it in his "Factories with Fences" speech, 16 December 1981; "If only 10 per cent of those who would otherwise return to prison do not, it would be worth the effort." See Haller, op. cit., note 18 above, p. 495. Haller analyses what she calls "the theology of work" in some detail. The benefits, as seen by an official United States study, are examined in Private Sector Involvement in Prison-Based Business, note 25 above, pp. 36 and 78-81. Business, prison wardens and legislators all ranked reduction of prisoner idleness as the main benefit. For a Canadian (Ontario) view and the opinions of the adviser to the Federal Government's Nielsen Task Force that work by prisoners for private industries reduces Canadian Correctional Commission costs for inmates and welfare services, see Ericson, supra note 15, p. 373.

50/ Private Sector Involvement in Prison-Based Business, pp. 37-73 sets out various models for the private sector, operating either as employer, investor, manager or customer, and the forms of involvement in states in the United States as in 1985.

51/ Ibid., p. 87. Prisoners in the United States strongly preferred private sector employment projects, not merely because they were better paid than in traditional prison industries, but because of resentment against the State levying room and board charges against inmate wages. They were hostile to working for their "keepers".

52/ Address at 10th Anniversary of the Audit Commission, 5 March 1993, pp. 17-18.

53/ Ibid., pp. 15-16. The ideology has in fact come from free-market anti-state sector research institutions. Just as in the United States, where the Rand Corporation think-tank first proposed prison privatization, the United Kingdom Adam Smith Institute gave the impetus with its publication Omega Justice Policy, A.S.I. Research Ltd, London, 1984. The Adam Smith Institute pursued prison privatization, despite initial Ministerial rejection of the concept, and published P. Young, The Prison Cell, A.S.I. Research (Ltd), London, 1987, painting a rosy view of the American experience and simultaneously criticizing "producer dominance" by the prison unions. Stephen Shaw, "The Short History of Prison Privatisation", (1992) Prison Service Journal, No. 87, pp. 30-32, comments that "it was the personal interest in the idea of private prisons of just two ... back benchers on the Home Affairs Committee ... which placed the issue so firmly on the political agenda". The Fourth Report from the Home Affairs Committee, Contract Provision of Prisons, H.C. Paper 291, 1987, recommended "that the Home Office should, as an experiment enable private sector companies to tender for the construction and management of custodial institutions". Thereafter,

management consultants Deloitte Heskins and Sells were commissioned to produce A Report to the Home Office on the Practice of Private Sector Involvement in the Remand System, 1989. They reported favourably. In the international accountancy world cross-links and potential conflicts of interest arise inevitably. The Prisons Unions Campaign notes that Corrections Corporation of America (See note 32 supra) had as its Tenessee-based independent auditors Deloitte and Touche: Prison Services Privatisation, note 27 above, p. 50.

54/ Home Secretary's Speech to the Prison Reform Trust, 24 March 1993, pp. 15-16.

55/ Framework Document, H.M. Prison Service, London, April 1993, p. 2, the Home Secretary.

56/ House of Commons Debates, 5 December 1991, col. 220, Secretary of State.

57/ D. Waplington, "Observations on a Visit to the Wolds", (1992) Prison Service Journal, No. 87, p. 33.

58/ Prison Reform Trust, Wolds Remand Prison Contracting-Out: A First Year Report, London, April 1993, pp. 26-27.

59/ See Prison Services Privatisation, supra, note 27 above, pp 28-38 and 92-93, documenting the deficiencies of security firms. In the United States a National Institute of Justice study found serious problems. References to various studies about the low quality of the personnel in private security companies are given in J.E. Field, "Making Prisons Private: An Improper Delegation of a Governmental Power", (1987) Hofstra Law Review, vol. 15, p. 664.

60/ Harding, op. cit., note 20 above, p. 7 states that capital costs were halved in New South Wales for the new Junee Prison which cost A$57 million. He also reveals, at p. 1, that running costs for the Queensland Remand and Reception Centre were A$11.5 million per annum as opposed to A$18 million if it were run by the public sector.

61/ See the countervailing arguments about operational advantages and disadvantages of having private prisons in W.I. Cikins, "Privatisation of the American Prison System: an Idea whose Time has Come?", (1986) Journal of Law, Ethics and Public Policy, vol. 2, 445 at 456-457.

62/ Some examples of financial failure or private prison facilities in the United States are cited in Prison Services Privatisation, op. cit., note 27 above, pp. 69-70. There are major problems if a contractor goes bankrupt and difficulties in taking his staff into the public sector. Restructuring and buy-out may be the answer, subject to safeguards as to the character of the purchaser in a "take-over bid" for the prison. The United Kingdom Prisons Unions Campaign is even more critical of cost cutting, staff firing, lack of adequate training by United States corporations in the

business of managing prisons and of alleged corruption: ibid., pp. 74-77 and 91-92.

63/ S.F. Stacy, "Capatalist Punishment: The Wisdom and Propriety of Private Prisons", (1991) Nebraska Law Review, vol. 70, 900, at 914. C. Logan, Private Prisons: Cons and Pros, New York, Oxford University Press, 1990, at P. 93, shows that savings at Immigration and Naturalization facilities ranged from 6 per cent to 72 per cent. In county prisons savings ranged from 5 per cent to 52 per cent, depending on space available for contracting out to other jurisdictions and the possibility of eliminating certain employees. Although a supporter of privatization, Professor Logan, at p. 117, declared that: "Private prisons will not necessarily be less expensive than those owned and run directly by the government".

64/ See Wolds Remand Prison Contracting-Out, op. cit., note 58 above, p. 15. On the early Wolds' costs at a time when the private prison was not full, it was costing $37,336 per annum per prisoner, whereas the average cost in the Prison Service in 1991/1992 was $22,984. But this is to compare peaches with bananas. The Secretary of State for the Home Department revealed that the weekly cost per prisoner for 1992, the first nine months of the Wolds' Remand Prison's operation, was £626 ($939). In the State Lindholme Prison, a category C training prison, the cost was £336 ($504), but he thought comparison misleading because, when a prison opens and is filling with prisoners, its unit costs are higher: House of Commons Debates, 30 March 1993, c. 115. The Director General of the Prison Service wrote to The Times, 2 June 1993, that Wolds' weekly costs per prisoner were now £350 ($525) and at the new Blakenhurst prison £310 ($465); whereas in the State sector the average was £440 ($660). He pointed out that the last figure included high security prisons.

65/ In the United States prison operating firms are accused of initial "low-balling" to accustom the public to private prisons and of intending to raise prices once this happens: J.M. Cheever, "Cells for Sale, National Law Journal, 19 February 1990, p. 33, col. 2. Similarly, in the United Kingdom the opposing prison officers' unions suggest that firms have adopted "loss leader" bids to win contracts, but accept that this cannot be proven either way because the contract finances are "commercially confidential", with information even being denied to Parliament: Prison Services Privatisation, note 27 above, p. 17. In contrast, the United States National Institute of Justice's research review, Private Sector Involvement in Prison - Based Business, note 25 above, pp. 83-84, concluded that private sector firms became involved in prison-based business (i.e. using prisoner labour) as much because of a desire to do good and to act with corporate responsibility as they did because of practical business needs. The survey, however, concluded that a firm "in the final analysis will be able to maintain its involvement only so long as it can financially justify doing so". This will a fortiori apply to the far larger responsibility of managing an entire prison.

66/ See Gentry, op. cit., supra note 43, pp. 358-359 and Stacy, op. cit., note 63 above, pp. 915-916. The United States official study, The Privatisation of Corrections, op. cit., note 25 above, p. 75, made the same

point about the capacity shrinking and the difficulty in reverting to public management.

67/ The Privatisation of Corrections, supra. note 25, at 50.

68/ It is cheaper tc reduce staff numbers and to keep inmates within a secure perimeter, as in some United States privatized institutions. Cells have televisions, even computer terminals to occupy inmates, while armed guards use audio and video equipment to observe them. Inmates seldom leave their cells. In the United Kingdom two forms of protection against this are promised. How inmates spend time will be set down in the contract and the controller will be on site to check standards: R. Graef, The Independent, 4 March 1993, p. 4. The Prison Reform Trust, reporting on the Wolds' first year of operation, found that, even fully acknowledging the teething problems of a new gaol, there was good cause for concern and that specified standards, particularly as to staff, were not being met. op. cit. note 58 above, pp. 37-39.

69/ The State may prospectively decide to economize. Overcrowding in future is not beyond contemplation: a parliamentary answer revealed that variations could be made to the contracted services at the Wolds, including changes to the level of occupancy should the inmate population exceed its normal level for a sustained period of time: H.C. Debates, 20 January 1992, col. 55, Minister of State. The contract tender documents for H.M. Prison Manchester, Schedule 1, Annex C, also envisage the contractor being required to accept prisoners above the agreed level of occupation.

70/ The evidence of comparable incidence in State and private prisons is limited and thus inconclusive, but co-prisoner assaults are a grave problem, running in the privatized Wolds Remand Prison in England at more than double the rate in State system: Wolds Remand Prison Contracting - Out: A First Year Report, op. cit., note 58 above, p. 34, para. 13.10 and 11. It is thought that unlawful availability of drugs was a factor.

71/ For example, at the Wolds no prison custody officers from an ethnic minority background were originally employed by Group 4, whereas as at 5 November 1992 9.7 per cent of the 237 unlocked prisoners were registered as being from ethnic minorities. By 19 March 1993 this percentage had fallen to 7.1 (22 out of 310 prisoners), while 3 members of staff (1.6 per cent of the total) were from ethnic minorities.

72/ The position at the first privatized English prison was explained by the Minister of State at the Home Office:

> "HM Prison Wolds is not required to implement Prison Service guidance and circular instructions on race relations. It is required, though, to have in place policies and procedures which achieve the same effect. Wolds management publishes and displays a race relations policy statement, provides training for staff in race relations issues, has appointed a race relations officer and committee, which meet on average every

two months, and collects monthly monitoring data. The contractor's performance is closely monitored by the on-site controller":

House of Lords Debates, 11 February 1993, WA 54, Earl Ferrers. An earlier answer had revealed that the training officer also served as the race relations officer.

73/ Connie Mayer, "Legal Issues Surrounding Private Operation of Prisons", (1986) Criminal Law Bulletin, vol. 22, 309, pp. 319-320.

74/ The municipal legal systems of two States, leaders in the field of prison privatization, do not recognize that a prisoner has a residuum of liberty, which would make a transfer to solitary confinement an infringement requiring procedural due process safeguards: see Hewitt v. Helms 459 U.S. 460 (1983). The Supreme Court held (p. 468) that it was "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration". Justice Stevens strongly dissented at 487-8. In R. v. Deputy Governor of Parkhurst Prison, Ex parte Haque [1992] 1 A.C. 58, the House of Lords held that the Governor and officers acting under his authority could restrain prisons within the defined bounds of the prison, that the prisoner's whole life was regulated by the regime and that accordingly a prisoner had no residual liberty: see especially Lord Bridge's judgement pp. 162-164.

75/ Even the function of drafting codes or rule books for prison is permitted to be exercised by prison contractors. This is because most states authorise public sector prison wardens to draft institutional rules and provide few state-wide regulations for prison discipline: J.E. Field, op. cit., note 59 above, p. 661. D.N. Wecht, "Breaking the Code of Deference: Judicial Review of Private Prisons", (1987) Yale Law Journal, vol. 96, p. 821, explains that, because of the legislatures' (and courts') willingness to rely on the training and expertise of correctional officers, they leave the enforcement of these rules to the discretion of prison staff: "Prisons are 'total institutions' where guards determine, on an everyday basis, what inmates may and may not do".

76/ Criminal Justice Act 1991 section 85 (3) and (b).

77/ In Wolds Remand Prison Contracting Out: A First Year Report, op. cit., supra note 58, these are many paragraphs about the failure of staff to intervene in assaults and supply of drugs: paras. 4.7-12, and 10.8. See also pp. 33-35, where the State view is that reporting on every incident is "punctilious". In the late 1920's a private prison in Michigan had to be closed because guards were not interested in suppressing the circulation of contraband.

78/ Criminal Justice Act 1991 section 86 (3) and (4).

79/ This requirement is intended to be met in terms of contract specifications and the need for certificates of fitness by the Secretary of State. However, there is no requirement that private and public sector prison

custody officers should not have previous criminal convictions. These are taken into consideration on appointment: House of Commons Debates, 23 April 1993, col. 216.

80/ D.W. Dunham, "Inmates' Rights and the Privatisation of Prisons", (1986) Columbia Law Review, vol. 86, 1475, 1479, cites United States authority showing that where private detention centre operators hire subcontractors, such subcontractors' employees, unless shown to be state actors with "state action" being present when subcontractors mistreat prisoners, will render neither the private prison operator nor the state officials liable for subcontractors' violations of prisoner's rights.

81/ For the United Kingdom see R. v. Deputy Governor of Parkhurst Prison, ex parte Hague [1992] 1 A.C. 58, where the House of Lords held that the Prison Rules 1964 were regulatory in character, providing a framework within which the prison regime operated, but were not intended to protect prisoners against loss, injury and damages, nor to give them a right of action. For the United States compare Connecticut Board of Pardons v. Dumschat 452 U.S. 458 (1981), where the Supreme Court declined to find a state-created liberty interest for a prisoner denied commutation of sentence, which, had it been found, would have enabled challenge on grounds of failure of due process. The relevant statute was not mandatory in language and did not explicitly define the obligations of those charged with granting the particular liberty: ibid., p. 465.

82/ The State is not vicariously liable for the tort of misfeasance of public office which arises when an officer knows his acts are outside his powers: see Racz v. Home Office, 4 December 1992 (Court of Appeal) Judgement, at p. 21. The applicability of vicarious responsibility is sought to be further reduced in privatized prisons in England and Wales where the contract specifications state that:

> "The Contractors shall at all times throughout the duration of the Agreement be an independent contractor and nothing in the Contract shall be construed as creating at any time the relationship of employer and employee between the Authority and the Contractor or any of the Contractor's employees. Neither the Contractor nor any of its employees shall at any time hold itself or themselves out to be the employee or employees of the Authority": Documents for the Operating Contract of H.M. Prison Manchester, schedule 5, Conditions of Agreement. F. 24.

83/ James, Young and Webster v. United Kingdom (7601/76; 7806/76) Judgement, 14 December 1979, 3 E.H.R.R. 20 and National Union of Belgium Police v. Belgium (4464/70) Judgement 27 May 1974, 1 E.H.R.R. 578 are precedents that the State must take positive measures to protect the individual's freedom against interference by private interests and that, if it fails to do so, it is liable precisely because those who inflict the interference are not: P. Sieghart, The International Law of Human Rights, Oxford: Clarendon Press, 1983, p. 44.

84/ West v. Atkins 487 U.S. 42 (1988) where the Supreme Court unanimously held that a private doctor's provision of medical services to inmates in terms of a contract with the state constituted "state action" and "action under colour of state law" for purposes of section 1983. See also Medina v. O'Neill 589 F. Supp. 1028 (D. Tex. 1984) where the discharge of a private guard's shotgun killed one and wounded another recaptured stowaway. The guard was employed by a private security agent contracting for incarceration of undocumented workers by the Immigration and Naturalization Service.

85/ See D.N. Wecht, "Breaking the Code of Deference: Judicial Review of Private Prisons", (1987) Yale Law Journal, vol. 96, 815 at 820, citing Procunier v. Martinez 416 U.S. 396 (1974) pp. 404-405 and numerous other Supreme Court decisions.

86/ J.E. Robertson, "The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates", (1987) Cincinnati Law Review, vol. 56, p. 91.

87/ Davidson v. Cannon 106 S.C. 668 (2986) and Daniels v. Williams 106 S.C. 662 (1986).

88/ The Interposition of a commercial insurance company, rather than direct payment by the State (which is its own insurer) carries risks. Insurance companies are notorious for disputing and delaying payment of claims and for settling at minimal sums under virtual duress where a plaintiff is without means.

89/ Report of the International Law Commission on the work of its forty-fourth session, 4 May-24 July 1992, Official Records of the General Assembly, forty-seventh session, Supplement No. 10, (A/47/10), p. 36.

90/ See Gentry, op. cit., note 43 above, p. 358, citing Richmond Newspapers Inc. v. Virginia 448 U.S. 555 (1980) pp. 571-572: "It is important that society's criminal process 'satisfy the appearance of justice' and the appearance of justice can best be provided by allowing people to observe it."

91/ Travis, Latessa and Vito, op. cit., note 28 above, p. 15; and Gentry, note 90 above, pp. 359-360. A particular risk is "capture of the regulator" by the regulated entity, either because the industry is more organized than the public at large, or "because the agency is populated by employees past, present and hopeful of the regulated industry", or because of "old boy loyalties" and ways of playing down difficulties. In the defence context this is known as "the revolving door" between the Pentagon and defence contractors. In the newly-privatized English prisons directors and some of their senior personnel have been recruited from the Prison Service and work closely with their former colleagues, controllers, who are charged with watching them.

92/ Public law remedies might be indirectly invoked in England and Wales by bringing proceedings against the Secretary of States for Home Affairs for failing to use his remaining discretionary powers of direction in accordance with law, but there must be pessimism about an extensive role for judicial

review: see J. Garner, "After privatization: Quis Custodiet Ipsos Custodes?" [1990] Public Law 329 and C. Graham, "The Regulation of Privatized Enterprises", [1991] Public Law 15.

93/ The only justification can be that this is the early stage of privatization and that it would be unfair to disclose such information to competitors. If such information is not disclosed after the initial period, there will then be no public accountability to the legislature. See, inter alia, House of Commons Debates, 24/1/92, col. 362; 4/11/92, col. 223; 11/11/92, col. 789; 16/11/92, col. 4; 7/11/92, col. 106; and 20/4/93, col. 1370.

94/ House of Commons Debates, 24/1/92, col. 362; 6/7/92, col. 38; and 23/3/93, col. 531.

95/ The following is a summary of views expressed by I.P. Robbins, "Privatisation of Corrections: Defining the Issues", (1986) Judicature, vol. 69, p. 331; J.E. Field, "Making Prisons Private: An Improper Delegation of a Governmental Power", (1987) Hofstra Law Review, vol. 15, 649 at pp. 673-674; and Stacy, op. cit., note 63 above, pp. 920-921.

96/ See H.P. Ehmke, "'Delegata Potestas non Potest Delegare'. A Maxim of American Constitutional Law", (1961) Cornell Law Quarterly, vol. 47, p. 50. Dr. Ehmke refutes some superficial conclusions, widely cited, about the context of Bracton's reference and the authors' denial that the maxim was a principle of constitutional law, which they put forward in a similarly named article. See P.W. Duff and H.E. Whiteside, (1929) Cornell Law Quarterly, vol. 14, p. 168.

97/ Contract theory and the notion that authority is drawn from the people goes back to the 12th century running through a chain of major constitutional thinkers from John of Salisbury (1159), Manigold of Lautenbach (1185), Marsilius of Padua (1324), Richard Hooker (1597), Johannes Althusius (1603), Hugo Grotius (1625), Thomas Hobbes (1651), John Locke (1690), and Jean-Jacques Rousseau (1762).

98/ Ehmke, note 96 above, p. 56. In contrast, the Pope and the Emperor permitted sub-delegation, but they were dealing with "empires" and not a single State.

99/ In the glosses on the Digest, sub-delegation of delegated jurisdiction is restricted: see citations of Spanish and French commentators in Duff and Whiteside, op. cit., note 97 above, p. 171. In ancient Rome only those appointed by the Emperor to make decisions were to make them. The maxim delegata potestas non potest delegare (D.1.21.5) was applied to judicial office. It was taken over not only in civil systems like Roman-Dutch Law but into the Common Law, where it has survived as a presumption of statutory interpretation and in the law of trusts, of agency and arbitration.

100/ Stacy, op. cit., note 63 above, p. 921.

101/ This argument was identified (together with the counter-policy of a legitimate role for private enterprise) in the United States Department of Justice Study, The Privatisation of Corrections, op. cit., note 25 above, p. 72.

102/ See Dilulio, op. cit., note 18 above, p. 5.

103/ Silver et al v. United Kingdom (5947/72) Report of the European Commission on Human Rights, 11 October 1980.

104/ The State is a delectus persona because of its perceived commitment to public service, its greater political accountability, and its greater ability to monitor and direct its own employees. In order for Government to control its own criminal justice system (including privatized prisons) there needs to be direct management and supervision.

105/ The State is a sovereign entity, inheritor of the regal powers and traditions. It is not perceived by its citizens as a private corporation with the primary aim of making profit - even if in medieval times kings were feudal magnates and modern States engage in business activity.

106/ The fact that the State acts through persons, civil servants, confuses lay persons, who cannot see why private persons should not perform the same functions. The position was explained, with emphasis on the need for accountability, in the judgement of Lord Greene M.R. in Carltona Ltd. v. Commissioners of Works and Others [1943] 2 All E.R. 560:

> "In the administration of Government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organization and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

107/ The Universal Declaration of Human Rights article 29.2 reads:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of

others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

108/ 630 F. 2d 876 (2d. Cir. 1980).

109/ 28 I. L. M. 291 (1989); Judgement 29 July 1988, see pp. 165-170.

110/ Many of these ideas appear in Dunham, op. cit., note 80 above; Wecht, op. cit., note 75 above; Gentry, op. cit., note 43 above; and Private Sector Involvement in Prison-Based Businesses, op. cit., note 25 above.

Annex I

BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT, APPROVED BY THE GENERAL ASSEMBLY IN RESOLUTION 43/173 OF 9 DECEMBER 1988

SCOPE OF THE BODY OF PRINCIPLES

These principles apply for the protection of all persons under any form of detention or imprisonment.

USE OF TERMS

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*. No circumstance whatever may be invoked as a justification of torture or other cruel, inhuman or degrading treatment of punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

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* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person on conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present priciple shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrests. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

Annex II

THE EUROPEAN PRISON RULES 1987

Revised European version of the Standard Minimum Rules for the Treatment of Prisoners (extracts)

Preamble

The purposes of these rules are:

(a) To establish a range of minimum standards for all those aspects of prison administration that are essential to human conditions and positive treatment in modern and progressive systems;

(b) To serve as a stimulus to prison administrations to develop policies and management style and practice based on good contemporary principles of purpose and equity;

(c) To encourage in prison staffs professional attitudes that reflect the important social and moral qualities of their work and to create conditions in which they can optimize their own performance to the benefit of society in general, the prisoners in their care and their own vocational satisfaction;

(d) To provide realistic basic criteria against which prison administrations and those responsible for inspecting the conditions and management of prisons can make valid judgements of performance and measure progress towards higher standards.

It is emphasized that the rules do not constitute a model system and that, in practice, many European prison services are already operating well above many of the standards set out in the rules and that others are striving, and will continue to strive, to do so. Wherever there are difficulties or practical problems to be overcome in the application of the rules, the Council of Europe has the machinery and the expertise available to assist with advice and the fruits of the experience of the various prison administrations within its sphere.

In these rules, renewed emphasis has been placed on the precepts of human dignity, the commitment of prison administrations to humane and positive treatment, the importance of staff roles and effective modern management approaches. They are set out to provide ready reference, encouragement and guidance to those who are working at all levels of prison administration. The explanatory memorandum that accompanies the rules is intended to ensure the understanding, acceptance and flexibility that are necessary to achieve the highest realistic level of implementation beyond the basic standards.

Part I

The Basic Principles

1. The deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules.

2. The rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, birth, economic or other status. The religious beliefs and moral precepts of the group to which a prisoner belongs shall be respected.

3. The purposes of the treatment of persons in custody shall be such as to sustain their health and self-respect and, so far as the length of sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will assist them to return to society with the best chance of leading law-abiding and self-supporting lives after their release.

4. There shall be regular inspections of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be, in particular, to monitor whether and to what extent these institutions are administered in accordance with existing laws and regulations, the objectives of the prison services and the requirements of these rules.

5. The protection of the individual rights of prisoners with special regard to the legality of the execution of detention measures shall be secured by means of a control carried out, according to national rules, by a judicial authority or other duly constituted body authorized to visit the prisoners and not belonging to the prison administration.

6. (1) These rules shall be made readily available to staff in the national languages;

(2) They shall also be available to prisoners in the same languages and in other languages so far as is reasonable and practicable.

Part III

Personnel

51. In view of the fundamental importance of the prison staff to the proper management of the institutions and the pursuit of their organizational and treatment objectives, prison administrations shall give high priority to the fulfilment of the rules concerning personnel.

52. Prison staff shall be continually encouraged through training, consultative procedures and a positive management style to aspire to humane standards, higher efficiency and a committed approach to their duties.

53. The prison administration shall regard it as an important task continually to inform public opinion of the roles of the prison system and the work of the staff, so as to encourage public understanding of the importance of their contribution to society.

54. (1) The prison administration shall provide for the careful selection on recruitment or in subsequent appointments of all personnel. Special emphasis shall be given to their integrity, humanity, professional capacity and personal suitability for the work.

(2) Personnel shall normally be appointed on a permanent basis as professional prison staff and have civil service status with security of tenure subject only to good conduct, efficiency, good physical and mental health and an adequate standard of education. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.

(3) Whenever it is necessary to employ part-time staff, these criteria should apply to them as far as that it is appropriate.

55. (1) On recruitment or after an appropriate period of practical experience, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests unless their professional qualifications make that unnecessary.

(2) During their career, all personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organized by the administration at suitable intervals.

(3) Arrangements should be made for wider experience and training for personnel whose professional capacity would be improved by this.

(4) The training of all personnel should include instruction in the requirements and application of the European Prison Rules and the European Convention on Human Rights.

56. All members of the personnel shall be expected at all times so to conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.

57. (1) So far as possible the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers, trade, physical education and sports instructors.

(2) These and other specialist staff shall normally be employed on a permanent basis. This shall not preclude part-time or voluntary workers when that is appropriate and beneficial to the level of support and training they can provide.

58. (1) The prison administration shall ensure that every institution is at all times in the full charge of the director, the deputy director or other authorized official.

(2) The director of an institution should be adequately qualified for that post by character, administrative ability, suitable professional training and experience.

(3) The director shall be appointed on a full-time basis and be available or accessible as required by the prison administration in its management instructions.

(4) When two or more institutions are under the authority of one director, each shall be visited at frequent intervals. A responsible official shall be in charge of each of these institutions.

59. The administration shall introduce forms of organization and management systems to facilitate communication between the different categories of staff in an institution with a view to ensuring cooperation between the various services, in particular, with respect to the treatment and resocialization of prisoners.

60. (1) The director, deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

(2) Whenever necessary and practicable the services of an interpreter shall be used.

61. (1) Arrangements shall be made to ensure at all times that a qualified and approved medical practitioner is able to attend without delay in cases of urgency.

(2) In institutions not staffed by one or more full-time medical officers, a part-time medical officer or authorized staff of a health service shall visit regularly.

62. The appointment of staff in institutions or parts of institutions housing prisoners of the opposite sex is to be encouraged.

63. (1) Staff of the institutions shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to an order based on law or

regulations. Staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

(2) Staff shall as appropriate be given special technical training to enable them to restrain aggressive prisoners.

(3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been fully trained in their use.